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No. 81-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Petitioners

v.

GRACIE ROBINSON and JUANITA HAGER, etc.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 13, 1981
CERTIORARI GRANTED OCTOBER 5, 1981

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I.

RELEVANT DOCKET ENTRIES

in the

United States District Court

for the

District of Columbia

in

Gracie Robinson and Juanita Hager, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.

No. 77-0698

RELEVANT DOCKET ENTRIES (D.D.C.)

DATE	PROCEEDINGS
1977	
April 22	Complaint; appearance
May 12	Answer by defendants to complaint
July 18	Motion by plaintiffs for certification as class action; memorandum; table of authorities
July 21	Amended answer by defendants
Sept. 21	Order filed on 9-20-77 granting motion of plaintiffs to certify as a class action; setting a status conference in chambers on 11-15 at 4:00 p.m. (See order for details.) (N) Gesell, J.
Oct. 17	Motion of defendants for summary judgment
Dec. 30	Cross-Motion of plaintiffs for summary judgment and response to defendants motion for summary judgment; statement of material facts; table of authorities; memorandum; attachment; c/m 12-20-77
1978	
Feb. 3	Cross-Motions for summary judgment argued and taken under advisement Gesell, J.
April 25	Memorandum and Order permitting defendants until 5-12-78 within which to indicate to the Court relevant testimony, if any, that will be forthcoming from the settlors. (N) Gesell, J.
June 14	Hearing re: bargaining positions and issues; proposals and counter proposals begun, concluded and taken under advisement. Gesell, J.
June 22	Memorandum and Order filed June 20, 1978, together with Court's earlier opinion constituting findings of fact and conclusions of law, entering judgment for the defendants. (N) Gesell, J.
June 22	Judgment filed 6-20-78 for defendants against plaintiffs (N) Gesell, J.

July	18	Notice of appeal by plaintiffs from order of June 22, 1978

II.

RELEVANT DOCKET ENTRIES

in the

United States Court of Appeals

for the

District of Columbia Circuit

in

Gracie Robinson and Juanita Hager, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.

No. 78-2047

RELEVANT DOCKET ENTRIES (D.C. Cir.)

DATE	FILINGS—PROCEEDINGS
1978	
Oct. 24	Certified Original Record (3 vols.) with 1 brown envelope of exhibits (8); 3 vols. transcripts under separate cover
Nov. 21	Certified Original Supplemental Record
Dec. 4	15—Appellants' brief
Dec. 4	10—Appendix
1979	
Jan. 26	25—Appellees' brief
March 1	15—Appellants' reply brief
Sept. 20	Argued before Robinson*, CJ and Davis, US Court of Claims Judge; The Court announced that Circuit Judge Robb is a member of the panel but was unable to be present. He will participate in the decision of this case with the briefs and tape of argument
1981	
Feb. 5	Opinion for the Court filed by Circuit Judge Robinson
Feb. 5	Concurring opinion filed by Judge Davis
Feb. 5	Dissenting opinion filed by Circuit Judge Robb
Feb. 5	Judgment reversing judgment of the District Court in accordance with the opinion of this Court filed herein this date
March 6	15—Appellees' petition for rehearing and suggestion for rehearing en banc
April 13	Per Curiam order that appellees' petition for rehearing is denied; Robinson and Robb (who would grant the petition for rehearing), CJ's; and Davis, Judge, US Court of Claims

RELEVANT DOCKET ENTRIES (D.C. Cir.)

DATE		PROCEEDINGS
April	13	Per Curiam order, en banc, that appellees' suggestion for rehearing, en banc, is denied; CJ McGowan, Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJ's (CJ's Tamm, MacKinnon and Robb would rehear this matter, en banc)
April	13	Per Curiam order, sua sponte, that the opinion filed herein by Circuit Judge Robinson on February 5, 1981, be and hereby is amended as follows: On page 14, continuation of footnote 51, after the last sentence of the paragraph ending with "because the bargainers agreed to them," insert the following: No ¶ That this court has power to review the constitutional and statutory legality of substantive terms of a collective bargaining agreement is beyond dispute. See, e.g., NLRB V. Magnovox Co., 415 U.S. 322, 325-327, 94 S.Ct. 1099, 1102-1103, 39 L.Ed.2d 358, 362-363 (1974); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 773-775, 72 S.Ct. 1022, 1025-1026, 96 L.Ed. 1283, 1288-1289 (1952); Steele v. Louisville & N. R.R., 323 U.S. 192, 199-202, 65 S.Ct. 226, 230-232, 89 L.Ed. 173, 181-183 (1944). Robinson and MacKinnon, CJ's; and Davis, Judge, US Court of Claims
April	20	4—Appellees' motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari
May	13	4—Appellees' motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari

RELEVANT DOCKET ENTRIES (D.C. Cir.)

DATE		PROCEEDINGS
May	19	Per Curiam order that appellees' motion to stay issuance of mandate is granted and the Clerk is directed not to issue the mandate herein prior to May 20, 1981; CJ Robinson and Robb, CJ; and Davis, Judge, US Court of Claims
June	15	Per Curiam order that appellees' motion to stay mandate is granted to and including July 14, 1981; CJ Robinson, Robb, CJ's; and Davis, Judge, US Court of Claims
July	17	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on July 13, 1981 in SC No. 81-61

III.

RELEVANT PLEADINGS AND OTHER DOCUMENTS

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1. Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, 1132 Cardinal Drive, Prestonsburg, Kentucky 41653, (606-886-3029) and JUANITA HAGER, Box 112, Auxier, Kentucky 41602, (606-886-2069) on behalf of themselves and all other persons similarly situated,

Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS; HARRY HUGE, C. W. DAVIS, and PAUL R. DEAN, Trustees of the United Mine Workers of America Health and Retirement Funds,

Defendants.

I. Introduction

1. This is a class action for damages, declaratory and injunctive relief brought by surviving spouses and surviving dependent children of deceased coal miners, challenging certain provisions of the defendant United Mine Workers of America 1950 Benefit Plan and Trust (hereinafter referred to as "1950 Benefit Plan and Trust"), pursuant to which plaintiffs' applications for survivor's health benefits have been denied by defendant Trustees. Plaintiffs' applications are based on their decedents' eligibility for Retirement Pensions and substantial years of employment with coal companies which were signatory to the effective National Bituminous Coal Wage Agreements; and, which were, therefore, making contributions in the form of royalties to the defendant United Mine Workers of America Health and Retirement Funds (hereinafter referred to as the "Funds").

2. Plaintiffs allege that, at the times of their decedents' deaths, said decedents were eligible in terms of age and years of service for Retirement Pensions under the United Mine Workers of America 1950 Pension Plan (hereinafter "1950 Pen-

sion Plan"). However, plaintiffs' decedents had not yet applied for the pensions at the times of their deaths.

3. Plaintiffs allege that the defendant Trustees' denial of plaintiffs' applications for survivor's health benefits is based solely on the fact that plaintiffs' decedents were not *actually receiving* Retirement Pensions at the times of their deaths, although plaintiffs' decedents were then *eligible for* Retirement Pensions. In other words, plaintiffs allege that the denial of plaintiffs' applications is based solely on the failure of their decedents to file written applications prior to their deaths. Plaintiffs contend that defendant Trustees' said denial of plaintiffs' applications is arbitrary and capricious and directly contrary to the overriding purpose of defendant Funds, that purpose being to compensate miners and the dependents and survivors of miners who have worked for significant periods of time with employers which were contributing the required royalties into defendant Funds. Plaintiffs contend, additionally, that defendants' said denial of plaintiffs' applications constitutes a breach of the defendant Trustees' fiduciary duty, which includes but is not limited to the duty to administer said Funds for the sole and exclusive benefit of the employees of contributing (i.e. "signatory") employers.

II. Jurisdiction

4. Jurisdiction is based upon Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1132(e)(f); Sections 301, 302(c)(e) of the Labor Management Relations Act of 1947, 29 U.S.C. §§185, 186(c)(e); and, 28 U.S.C. §1332. The amount in controversy for each individual plaintiff and for the class as a whole exceeds ten thousand dollars ($10,000) exclusive of costs and interest. Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. §2201-02.

III. Parties

5. Plaintiff Gracie Robinson is the fifty-six (56) year old widow of Floyd Robinson. Mr. Robinson died on November 18, 1967, five (5) days after his fifty-fifth birthday. Mr. Robinson worked in this nation's bituminous coal mines for more than

thirty-five years. Plaintiff Gracie Robinson resides at 1132 Cardinal Drive, Prestonsburg, Floyd County, Kentucky.

6. Plaintiff Juanita Hager is the fifty-nine (59) year old widow of Paul C. Hager. Mr. Hager died on March 22, 1971 at the age of fifty-nine (59). Mr. Hager worked for approximately thirty-nine (39) years in this nation's bituminous coal mines. Plaintiff Juanita Hager resides at Auxier, Floyd County, Kentucky.

7. Defendant Funds are four (4) separate irrevocable trusts created, pursuant to Section 302(c) of the Labor Management Relations Act of 1947, to provide health and retirement benefits to active miners and their families and dependents; to retired miners and their families and dependents and, to the survivors and dependents of deceased miners. The situs of these trusts is Washington, D.C. Their principle administrative offices are located at 2021 "K" Street, N.W., Washington, D.C. 20006.

8. The defendant 1950 Benefit Plan and Trust is one of said irrevocable trusts. The specific eligibility provisions now contained in the 1950 Benefit Plan and Trust were independently promulgated by written Resolutions of defendant Trustees and were recently incorporated (unchanged in substance) into the National Bituminous Coal Wage Agreement of 1974 (hereinafter referred to as "1974 Contract"), at Article XX of the Agreement under the title "United Mine Workers of America 1950 Benefit Plan and Trust." These provisions govern the allocation of health benefits to miners and their dependants and survivors in a variety of circumstances. (For purposes of clarity and convenience, plaintiffs will refer herein to the relevant sections of the 1950 Benefit Plan and Trust and the 1950 Pension Plan, rather than to the particular Trustee Resolutions which created the respective eligibility categories being referred to. However, reference to the 1950 Benefit Plan and Trust or to the 1950 Pension Plan should be viewed as reference to both the official trust or Plan and to the appropriate Trustee Resolution.)

9. The four said defendant trusts consist of fixed, pertonnage royalties paid by employers which are, or were at the time in question, signatory to the National Bituminous Coal Wage Agreement. Pursuant to Section 302 of the Labor Management Relations Act of 1947, said royalties are required to be paid and applied for the sole and exclusive benefit of the employees of these contributing or "signatory" employers.

10. Defendants Harry Huge, C. W. Davis, and Paul R. Dean are trustees of the defendant Funds. Their offices are located at 2021 "K" Street, N.W., Washington, D.C. 20006. Defendant Harry Huge is the Chairman of defendant Trustees. Defendants Huge and Dean are citizens and residents of Virginia; Defendant Davis is a citizen and resident of West Virginia.

IV. Class Action Allegations

11. Plaintiffs Robinson and Hager bring this action on behalf of themselves, and on behalf of all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class represented by these plaintiffs consists of all surviving spouses and dependant children whose applications for survivor's health benefits have been or will be denied because their decedents had not yet applied for and begun receiving Retirement Pensions at the times of said decedents' deaths, although said decedents were eligible for Retirement Pensions at the times of their deaths.

12. The class of plaintiffs set forth in Paragraph No. 11 above is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of plaintiffs Robinson and Hager are typical of the claims of the class; and, plaintiffs Robinson and Hager will fairly and adequately represent and protect the interests of the class. Further, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for defendants; and, said separate prosecution would create an additional risk of adjudications with respect to individ-

ual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications, and would substantially impair or impede their ability to protect their interests. Moreover, defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

13. Plaintiffs Robinson and Hager are unable, without conducting discovery, to precisely determine the size of the class. However, plaintiffs estimate that the class contains at least two to three hundred surviving spouses and at least several hundred more surviving dependent children. Plaintiffs Robinson and Hager are appropriate persons to represent the class of plaintiffs, particularly because of the undisputed pension eligibility of Floyd Robinson and Paul Hager at the times of their deaths, and particularly because of the significant years of signatory service performed by Floyd Robinson and Paul Hager. The factual and legal questions raised by plaintiffs Robinson and Hager are identical to those which would be raised by individual class members.

14. The questions of fact common to the class represented by plaintiffs Robinson and Hager include the following:

a. Whether plaintiffs' decedents were eligible for but not "receiving" because they had not yet applied for, Retirement Pensions at the times of their deaths;

b. Whether plaintiffs' applications for survivor's health benefits have been denied by defendant Trustees because plaintiffs' decedents were not receiving pensions at the times of their deaths;

c. Whether defendant Trustees, or their predecessors, or the agents of either made intentional and fraudulent misrepresentations or omissions of material facts regarding:

1. the particular requirements for and pre-requisities to the provision by defendants of health and/or pension benefits to said decedents and their survivors;

2. the point at which the decedents' interest (or the interest of decedents' survivors) in pension and/or health benefits become non-forfeitable in relation to any subsequent acts, conditions, or occurrences, including decedents' deaths; and/or,

3. the actuarial assumptions and principles upon which the provision of pension and health benefits by defendants is based, including the likelihood of decedents or their survivors ever receiving benefits from defendants.

15. The questions of law common to the class represented by plaintiffs Robinson and Hager include the following:

a. Whether the defendants' requirement that a miner who was eligible for a Retirement Pension be actually receiving that pension at the time of his death in order for his surviving spouse and dependent children to be eligible for survivor's health benefits is arbitrary and capricious;

b. Whether the defendants' requirement that a miner who was eligible for a Retirement Pension be actually receiving that pension at the time of his death in order for his surviving spouse and dependent children to be eligible for survivor's health benefits violates Section 302 of the Labor Management Relations Act of 1947;

c. Whether defendant Trustees have breached their fiduciary duties to plaintiffs;

d. Whether defendant Trustees' exclusion of plaintiffs from eligibility for said health benefits solely because of the involuntary failure of plaintiffs' decedents to file written applications for Retirement Pensions prior to their deaths constitutes an unreasonable and unlawful divestiture of plaintiffs' vested rights to survivor's health benefits;

e. Whether the language of Article II, E(3) of the defendant 1950 Benefit Plan and Trust requires the denial by

defendant Trustees of survivor's health benefits to plaintiffs; and,

f. Whether defendant Trustees, or their predecessors, or the agents of either have violated the provisions of §17(a) of the Securities Act of 1933, 15 U.S.C. §§77a-77aa, and/or §10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. §§78a-78jj, 17 C.F.R. §240.10(b)-5, by making certain fraudulent and material misrepresentations and omissions.

V. Facts

16. Plaintiff Gracie Robinson's husband, Floyd Robinson began working in this nation's underground coal mines in 1930, and worked steadily in the coal industry until his death on November 18, 1967. Specifically, Mr. Robinson worked from 1930 until 1942 with the Utility Coal Company at Martin, Kentucky, and from 1942 until November 18, 1967 with the Princess Elkhorn Coal Company at David, Kentucky (the Company's name changed to Princess Coals, Inc. in 1959).

17. Floyd Robinson was an active, dues paying member of the United Mine Workers of America from the time of its creation in Floyd County, Kentucky until the time of Mr. Robinson's death in 1967.

18. The Princess Elkhorn Coal Company and its successor, Princess Coals, Inc., were signatory to the National Bituminous Coal Wage Agreements in effect from 1942 through 1967, and were contributing the required per tonnage royalties into the treasury of defendant Funds continuously from the inception of defendant Funds (and said royalty system) in May, 1946 through 1967.

19. On November 18, 1967, five days after his fifty-fifth birthday, Mr. Robinson died at home. The cause of his death is unclear, although Mr. Robinson's family physician attributed the death to collapse of the lungs. No autopsy was performed.

20. Having worked steadily up until the day of his death, Mr. Robinson had planned, after reaching his fifty-fifth birth-

day, to retire and collect his Retirement Pension from defendant Funds. Because he had only reached his fifty-fifth birthday five days earlier, he had not yet formally retired and applied for said pension at the time of his death.

21. Defendants have credited Mr. Robinson with twenty-five (25) years of "classified service," *including* twenty-one (21) years of "signatory service" (i.e. employment after May 28, 1946 with a Company which was signatory to the National Bituminous Coal Wage Areements, and which, therefore, was contributing the required per tonnage royalties into the treasury of defendant Funds).

22. Based on said substantial years of classified and signatory service, Mr. Robinson was eligible at the time of his death for a Retirement Pension under Article II, B of the defendants' 1950 Pension Plan, which requires:

a. that the applicant retired prior to December 31, 1975;

b. that the applicant have attained the age of fifty-five (55) years; and,

c. that the applicant have completed twenty (20) years of classified service, including five (5) years of signatory service, *or* have completed ten (10) years of signatory service, including at least three (3) years of signatory service after December 31, 1970.

23. Plaintiff Gracie Robinson applied for survivor's health benefits, and was denied by defendant Trustees on February 10, 1975. After exhausting all administrative remedies available to her, plaintiff Robinson was notified by defendant Trustees in correspondence dated January 26, 1976 that said denial was final and that no further consideration would be given to her claim for survivor's health benefits.

24. Plaintiff Juanita Hager's husband, Paul C. Hager, began working in this nation's underground coal mines in 1931. He worked continuously in the coal industry until March, 1968, when he retired and applied for a Retirement Pension from defendants.

25. Mr. Hager's said application was granted by defendants, and he briefly received a monthly Retirement Pension and accompanying health benefits from defendants. Being unable to adequately support himself and his family on said pension, Mr. Hager returned to work in the coal mining industry in October, 1968, thereby discontinuing said pension benefits. He worked steadily in the industry until immediately prior to his death in 1971.

26. Mr. Hager died on March 22, 1971. His death followed complications which developed after an operation for gallstones. A biopsy performed after Mr. Hager's death revealed that, at the time of his death, he was suffering from coal worker's pneumoconiosis.

27. Thus, Mr. Hager worked for approximately thirty-nine (39) years in the coal industry. Specifically, he worked with three (3) companies, the Northeast Coal Company at Auxier, Kentucky; the Princess Elkhorn Coal Company (and its successor Princess Coals, Inc.) at David, Kentucky; and, the Patsy Development Company, Inc., at David, Kentucky. All of Mr. Hager's coal work after May 28, 1946 (the date of the creation of defendant Funds) was for employers which were signatory to the National Bituminous Coal Wage Agreements and which were therefore, contributing the required royalties into the treasury of the defendant Funds.

28. At the time of his death, Mr. Hager was an active, dues paying member of the United Mine Workers of America, and had been a dues paying member of that Union since its inception in Floyd County, Kentucky.

29. On the basis of his thirty-nine (39) or more years of classified coal service, *including* more than twenty-four (24) years of signatory service with employers who were contributing to the defendant Funds, Mr. Hager was eligible at the time of his death for a Retirement Pension under Article II, B of defendants' 1950 Pension Plan, the particular requirements of which were enumerated in Paragraph No. 22 above.

30. Plaintiff Juanita Hager applied for survivor's health benefits, and was denied by defendant Trustees on April 28,

1975. After exhausting all administrative remedies available to her, plaintiff Hager was notified by defendants, in correspondence dated February 4, 1976, that said denial was final and that defendants would give no further consideration to her claim for survivor's health benefits.

31. Under Article II, E(1)-(4) of the defendant 1950 Benefit Plan and Trust, in order for an unmarried surviving spouse and surviving dependents of a deceased coal miner who died prior to December 6, 1974 to be eligible to receive survivor's health benefits, the deceased miner must have fallen into one of the following four categories:

a. the miner died as a result of a mine accident which occurred after May 28, 1946, while the miner was working in a classified job for a "signatory" employer; or,

b. at the time of his death, the miner was unemployed, permanently and totally disabled, and had been awarded Workmen's Compensation Benefits for an injury or occupational disease sustained prior to December 6, 1974, as a direct result of classified, signatory employment after March 5, 1950; or,

c. at the time of his death, the miner was unemployed and permanently and totally disabled as a result of a mine accident which occurred after May 28, 1946 and prior to December 6, 1974 while the miner was employed in a classified job for a "signatory" employer; and, the miner was eligible for a Disability Pension under the 1950 Pension Plan; or,

d. at the time of his death the miner was receiving a retirement or disability pension under the 1950 Pension Plan.

32. Although at the times of their deaths plaintiffs' decedents were clearly eligible for Retirement Pensions under defendants' 1950 Pension Plan, plaintiffs' applications for survivor's health benefits were denied by defendant Trustees *solely because* said decedents were not actually receiving Retirement Pensions at the times of their deaths (i.e. because decedents

had not yet filed written applications for said Retirement Pensions at the times of their deaths).

33. The purpose of defendant Funds is to compensate those miners who have worked for employers who were signatory to the effective National Bituminous Coal Wage Agreements, particularly those miners who have substantial years of work with "signatory" employers, and the survivors and dependents of those miners.

34. As a result of defendants' denial of plaintiffs' applications for survivor's health benefits, plaintiffs have been financially unable to obtain or afford the medical treatment of which they are in need. Without said health benefits, plaintiffs will be forced to forego necessary medical treatment and will suffer irreparable damage as a result.

35. Unless said health benefits are provided to plaintiffs, and any further such denials of applications for health benefits enjoined by this Court, plaintiffs will continue to suffer immediate and irreparable injury, loss and damage, for which they will have no adequate remedy at law.

VI. First Claim for Relief

36. Plaintiffs re-allege each and every allegation contained in Paragraph Nos. 1 through 35 inclusive, with the same force and effect as though set forth here in full.

37. The Plaintiffs fall within the class of persons whom the defendant Funds were created and intended to serve by means of pension and health benefits.

38. The defendants' requirement that a miner who was eligible for a Retirement Pension be actually "receiving" that pension at the time of his death in order for his survivors to be eligible for survivor's health benefits bears no rational relationship with, does nothing to further, and is in fact directly contrary to the intents and purposes of defendant Funds. Moreover, said requirement in no way furthers any valid or overriding administrative interests. As such, said requirement is arbitrary and capricious as applied to plaintiffs; and,

said requirement is violative of Section 302 of the Labor Management Relations Act of 1947. Therefore, said requirement should be stricken and declared null and void.

VII. Second Claim for Relief

39. Plaintiffs re-allege each and every allegation contained in Paragraphs Nos. 1 through 38 inclusive, with the same force and effect as though set forth here in full.

40. By denying plaintiffs' said applications and by interpreting said provision, that a miner have been "receiving" a pension at the time of his death, to require the denial of plaintiffs' applications, defendant Trustees have breached the fiduciary duties owed to plaintiffs and to plaintiff's decedents. The direct result of this breach is that plaintiffs have been denied the health benefits to which they are rightfully entitled, based on said decedents' undisputed pension eligibility at the times of their deaths.

VIII. Third Claim for Relief

41. Plaintiffs re-allege each and every allegation contained in Paragraph Nos. 1 through 40 inclusive, with the same force and effect as though set forth here in full.

42. At the time that plaintiffs' decedents became eligible for said Retirement Pensions in terms of age and years of classified and signatory service, their rights and rights of plaintiffs to retirement and health benefits became vested. Defendants' exclusion of plaintiffs from survivor's health benefits based solely on the involuntary failure of plaintiffs' decedents to file written applications for Retirement Pensions prior to their deaths is an unreasonable, unjustifiable and unlawful divestiture of plaintiffs' said vested rights.

IX. Fourth Claim for Relief

43. Plaintiffs re-allege each and every allegation contained in Paragraph Nos. 1 through 42 inclusive, with the same force and effect as though set forth here in full.

44. The initial inclusion of work performed by plaintiffs' decedents under the terms and conditions of the effective collectively bargained National Bituminous Coal Wage Agreement, which called for contributions by said decedents' employers into the defendant Funds, amounted to a sale to plaintiffs' decedents of an interest in the defendant Funds. Such a sale of an interest in the defendant Funds was a sale of a security within the meaning of Sections 2(1) and 2(3) of the Securities Act of 1933.

45. The inclusion of work performed by plaintiffs' decedents under the terms and conditions of all subsequent collectively bargained National Bituminous Coal Wage Agreements, calling for the employer of plaintiffs' decedents to make contributions into the defendant Funds, were similarly sales of securities to said decedents within the meaning of Sections 2(1) and 2(3) of the Securities Act of 1933.

46. In connection with these sales to plaintiffs' decedents of security interests in the defendant Funds, defendants fraudulently and intentionally made material misrepresentations to plaintiffs' decedents as to the nature of their interests in defendant Funds and, in addition, fraudulently and intentionally omitted to state numerous material facts with respect to those interests.

47. These misrepresentations and omissions included, but were not limited to:

a. misrepresentations and omissions of material facts as to the conditions plaintiffs' decedents were required to meet in order to assure the receipt by their survivors of health benefits from the defendant Funds in the event of said decedents' deaths;

b. misrepresentations and omissions of material facts with respect to the point at which plaintiffs' decedents' interests in benefits from the defendant Funds would become non-forfeitable for any reason, including their deaths; and,

c. omissions of material facts with respect to the actuarial assumptions on which the provision of pension and health benefits by the defendant Funds was based, and with respect to the likelihood that either plaintiffs' decedents or plaintiffs would ever receive pension or health benefits of any kind from the defendant Funds.

48. These fraudulent and intentional misrepresentations and omissions were carried out by defendants in violation of requirements of section 17(a) of the Securities Act of 1933, 15 U.S.C. §77a-77aa, and §10(b) and Rule 10b-5, thereunder, of the Securities Exchange Act of 1934, 15 U.S.C. §78a-78jj, and 17 C.F.R. §240.10(b)-5.

WHEREFORE, plaintiffs respectfully pray for the following relief:

1. For certification that the instant case may be maintained as a class action, pursuant to FRCP 23(b)(1);

2. For judgment against defendants:

a. declaring plaintiffs and the members of the class represented by plaintiffs to be eligible for survivor's health benefits;

b. ordering defendant Trustees to immediately issue "health services cards" to plaintiffs and the members of the class represented by plaintiffs; and,

c. ordering defendant Trustees to reimburse plaintiffs and the members of the class for all medical expenses which they have incurred since the dates of their respective applications, and which would have been covered by said cards had such cards been issued.

3. For an Order permanently enjoining defendants from any further denials of applications for survivor's health benefits on the grounds that the applicant's decedent had not actually filed an application for a Retirement Pension prior to the decedent's death;

4. For an Order requiring defendant Trustees:

a. to provide notice of the potential effects of this action on eligibility for survivor's health benefits to all members of the class represented by plaintiffs and to all others who may be eligible for survivor's health benefits as a result of this action, said notice to be reasonably calculated to reach all such persons;

b. to institute a procedure for the application or re-application for survivor's health benefits by survivors of coal miners who are potentially eligible as a result of the judgment herein;

5. For damages, in an amount to be determined by the Court, for defendants' said material and fraudulent misrepresentations and omissions in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934;

6. For reasonable attorney's fees;

7. For costs of this action; and,

8. For any other relief which the Court deems proper.

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III.
2. Amended Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Defendants.

AMENDED ANSWER

Defendants, by their undersigned counsel, hereby answer the Complaint as follows:

First Defense

1. In answer to paragraph 1 of the Complaint: Admit that plaintiffs' applications for survivor's health benefits have been denied under the terms of the applicable provisions of the United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Plan and Trust"); state further that plaintiffs received full health care coverage for a period of approximately five years following the deaths of their spouses ("decedents") in accordance with the Resolution of the predecessor trust, the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"),* in effect at the time of the decedents' deaths; deny that the decedents were eligible for pension benefits at the time of their deaths from the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan") or from the 1950 Fund on the grounds that the decedents were active miners immediately preceding the time of their deaths and had not applied for pension benefits in accordance with the terms of the applicable rules.

---

*On December 6, 1974, the United Mine Workers of America and various coal operators, pursuant to the National Bituminous Coal Wage Agreement of 1974, created four new trust funds to replace the 1950 Fund. One of those four trusts, the 1950 Pension Plan, expressly succeeded the 1950 Fund.

2. In answer to paragraph 2 of the Complaint: Admit that the decedents met the age and years of service requirements for pension benefits under the terms of the 1950 Pension Plan; admit that said decedents had not applied for pension benefits from the 1950 Pension Plan at the times of their deaths; deny that decedents were eligible to receive pension benefits from the 1950 Pension Plan or the 1950 Fund under the applicable Resolutions at the times of their deaths; and state further that the 1950 Pension Plan was not established until several years after the deaths of plaintiffs' decedents.

3. Deny the allegations of paragraph 3 of the Complaint.

4. In answer to paragraph 4 of the Complaint: Admit that jurisdiction lies under Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(e) and (f) to hear the First, Second and Third Claims for Relief; deny that jurisdiction lies under any of the statutes set forth in the paragraph to hear the Fourth Claim for Relief; admit that plaintiffs purport to seek declaratory relief; state that they lack information sufficient to form a belief as to the truth of the allegations of the amount in controversy for each purported class member.

5. In answer to paragraph 5 of the Complaint: Admit the allegations of the first sentence; admit the allegations of the second sentence; state that they lack information sufficient to form a belief as to the truth of the allegations of the third sentence; admit the allegations of the fourth sentence.

6. In answer to paragraph 6 of the Complaint: Admit the allegations of the first sentence; admit the allegations of the second sentence; deny the allegations of the third sentence but admit that the husband of plaintiff Hager has been credited with 22 years of classified service; admit the allegations of the fourth sentence.

7. In answer to paragraph 7 of the Complaint: Admit that there are four separate trusts, the 1950 Pension Plan, the 1974 Pension Plan, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust which collectively are referred to as the United Mine Workers of America Health and Retirement Funds; admit that the 1950 Pension Plan and the 1974 Pension

Plan provide benefits to retired miners who are eligible under the terms of said Plans; admit that the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust provide health benefits and certain other benefits to miners and their dependents who are eligible under the terms of said Plans and Trusts; admit the remaining allegations.

8. In answer to paragraph 8 of the Complaint: Admit the allegations of the first sentence; deny the allegations of the second sentence; state that the remaining allegations are too broad and too vague to either admit or deny.

9. In answer to paragraph 9 of the Complaint: Admit the allegations of the first sentence to the extent that said allegations pertain to the 1950 Pension Trust and to the 1950 Benefit Plan and Trust; allege that Section 3 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), speaks for itself.

10. Admit the allegations of paragraph 10.

11. In answer to paragraph 11 of the Complaint: Admit that plaintiffs purport to bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure; deny the remaining allegations.

12. Deny the allegations of paragraph 12 of the Complaint.

13. In answer to paragraph 13 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegation of the first sentence; deny the remaining allegations.

14. Deny the allegations of paragraph 14.

15. Deny the allegations of paragraph 15.

16. In answer to paragraph 16 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence and the first part of the second sentence; admit the allegations of the second half of the second sentence.

17. State that they lack information sufficient to form a belief as to the truth of the allegations of paragraph 17; state fur-

ther that union membership is not a condition for eligibility for pension or health benefits for a miner or his dependents.

18. Admit the allegations of paragraph 18 of the Complaint.

19. In answer to paragraph 19 of the Complaint: Admit the allegations of the first sentence; state that they lack information sufficient to form a belief as to the truth of the remaining allegations.

20. In answer to paragraph 20 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence; admit that Floyd Robinson had not retired and applied for pension benefits at the time of his death.

21. Admit that Robinson was credited with twenty-five (25) years of classified service including twenty-one (21) years of signatory service for purposes of this litigation; deny that Robinson applied for a pension from the 1950 Pension Plan or the 1950 Fund.

22. In answer to the paragraph 22 of the Complaint: Admit that Floyd Robinson meets the age and service requirements of the 1950 Pension Plan and the applicable Resolutions of the 1950 Fund; deny that he was eligible at the time of his death to a pension under the terms of the 1950 Pension Plan or the applicable Resolutions of the 1950 Fund; state further that the 1950 Pension Plan was not established until more than 7 years after his death.

23. Admit generally the allegations of paragraph 23 of the Complaint.

24. In answer to paragraph 24 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence; admit that Paul Hager has been credited with 22 years of classified service prior to his retirement in March 1968.

25. In answer to paragraph 25 of the Complaint: Admit the allegations of the first sentence; admit that Paul Hager returned to classified service in October 1968; state that his pen-

sion benefits were terminated as a result of his return to classified service; state that they lack information sufficient to form a belief as to the reasons for his return to classified service; admit that he remained in classified service until the time immediately preceding his death in 1971.

26. In answer to paragraph 26 of the Complaint: Admit the allegations of the first sentence; state that they lack information sufficient to form a belief as to the truth of the remaining allegations.

27. In answer to paragraph 27 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence; admit that Paul Hager was employed by Princess Elkhorn Coal Co. and its successor from 1946 to 1968; admit that the companies for whom Paul Hager worked after May 28, 1946 were signatories to the National Bituminous Coal Wage Agreements then in effect.

28. State that they lack information sufficient to form a belief as to the truth of the allegations of paragraph 28 of the Complaint: state further that union membership is not a condition for eligibility for pension or health benefits for a miner or his dependents.

29. In answer to paragraph 29 of the Complaint: Admit that Paul Hager meets the age and service requirements of the 1950 Pension Plan and the applicable Resolutions of the 1950 Fund; deny that he was eligible at the time of his death for a pension under the terms of the 1950 Pension Plan or the applicable Resolutions of the 1950 Fund; state further that the 1950 Pension Plan was not established until more than three years after his death.

30. Admit generally the allegations of paragraph 30 of the Complaint.

31. In answer to paragraph 31 of the Complaint: Allege that the terms of Article II E(1)-(4) of the 1950 Benefit Plan and Trust speak for themselves.

32. Deny the allegations of paragraph 32 of the Complaint.

33. Deny the allegations of paragraph 33 of the Complaint.

34. State that they lack information sufficient to form a belief as to the truth of the allegations of paragraph 34.

35. Deny the allegations of paragraph 35 of the Complaint.

36. Reassert each and every response to the allegations contained in paragraphs 1 through 35 of the Complaint.

37. Deny the allegations of paragraph 37 of the Complaint.

38. Deny the allegations of paragraph 38 of the Complaint.

39. Reassert each and every response to the allegations contained in paragraphs 1 through 38 of the Complaint.

40. Deny the allegations of paragraph 40 of the Complaint.

41. Reassert each and every response to the allegations contained in paragraphs 1 through 40 of the Complaint.

42. Deny the allegations of paragraph 42 of the Complaint.

43. Reassert each and every response to the allegations contained in paragraphs 1 through 42 of the Complaint.

44. Deny the allegations of paragraph 44 of the Complaint.

45. Deny the allegations of paragraph 45 of the Complaint.

46. Deny the allegations of paragraph 46 of the Complaint.

47. Deny the allegations of paragraph 47 of the Complaint.

48. Deny the allegations of paragraph 48 of the Complaint.

Second Defense

Each of the Four Claims for Relief fails to state a claim upon which relief can be granted.

Third Defense

The Court lacks subject matter jurisdiction over the Fourth Claim of Relief.

Fourth Defense

The 1950 Benefit Plan and Trust and the 1950 Pension Plan were created and their terms were established on December 6, 1974 by the United Mine Workers of America and various coal operators pursuant to the National Bituminous Coal Wage Agreement of 1974. The defendants have exercised their duty faithfully to enforce the express terms of the Trusts which do not provide permanent health care coverage to plaintiffs and therefore said denial of benefits to plaintiffs by defendants is not arbitrary or capricious.

Fifth Defense

The 1950 Benefit Plan and Trust created the right to permanent health care coverage for spouses of certain deceased spouses. No material misrepresentations or fraudulent and intentional omissions of fact could have been made by defendants to plaintiffs' decedents concerning the right of their spouses to permanent health care since said decedents died several years prior to the creation of the benefit.

Sixth Defense

Plaintiffs Robinson and Hager, upon the deaths of their husbands, each received from the 1950 Fund, under the terms of Resolutions 68 and 69, five thousand ($5,000) dollars in death benefits and approximately five years of health coverage. Surviving spouses of pensioners each received under the terms of Resolutions 68 and 69 two thousand ($2,000) dollars in death benefits and approximately two years of health care coverage. If the named plaintiffs are awarded permanent health care coverage under their First, Second or Third Claim for Relief on the grounds that they should have been treated as the surviving spouses of pensioners and not of active miners, plaintiffs will be placed in a financially more favorable position than those who have previously been awarded benefits as the surviving spouses of pensioners. Accordingly, in the event that the Court were to order provision of permanent health care coverage, plaintiffs would be obligated to pay defendants the difference between what they received as surviving spouses of

active miners and what they would have received as surviving spouses of pensioners.

WHEREFORE, defendants pray that the Complaint be dismissed and judgment be entered for defendants with all costs assessed against plaintiffs and for such other further relief as the Court may deem just.

Respectfully submitted,

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Attorneys for Defendants

III.

3. Order, September 20, 1977, Granting Plaintiffs' Motion to Certify as a Class Action

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS, *et al.*,
Defendants.

ORDER

The Court has considered plaintiffs' motion to certify as a class action, the memoranda of points and authorities in support thereof, the opposition filed thereto, and the oral arguments of the parties, and it appearing that this action may properly be maintained as a class action for the purposes of declaratory relief pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, therefore it is hereby

ORDERED that plaintiffs' motion to certify as a class action be, and the same hereby is partially granted, and it is further

ORDERED that the class herein is defined as all surviving spouses and dependent children of deceased coal miners:

(a) whose decedents prior to the time of death satisfied the age and service requirements for pension benefits;

(b) who would be eligible for survivors' health benefits under the terms of the 1950 Benefit Plan and Trust if their decedents had been receiving pension benefits at the time of death; and

(c) whose decedents fit within one of the following subclasses:

(1) was working in classfied service in the coal industry at the time of death and had not applied for a pension;

(2) had applied for and was eligible to receive pension benefits but was not receiving such benefits at the time of death because of his return to classified service in the coal industry.

The propriety of maintaining the class for the purposes of injunctive relief shall be addressed if and when plaintiffs prevail on the merits addressed by declaratory judgment.

The above case is set down before the undersigned for a status conference with counsel in chambers at 4:00 p.m. on November 15, 1977.

/s/ Gerhard A. Gesell
GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

September 20, 1977.

III.

4. Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et. al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS, *et. al.*,
Defendants.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 1-9(h) of the Rules of the Court, plaintiffs by their undersigned counsel submit the following statement of material facts as to which there is no genuine issue.

1. Plaintiff Gracie Robinson's husband, Floyd Robinson, began working in this nation's underground coal mines in 1930, and worked steadily in the coal industry until his death on November 18, 1967. Mr. Robinson worked with the Utility Coal Company at Martin, Kentucky from 1930 until 1942, and with the Princess Elkhorn Coal Company at David, Kentucky (the Company's name changed to Princess Coals, Inc. in 1959) from 1942 until November 18, 1967 when he died unexpectedly.

[Complaint, para. 16; Answer, para. 16; Robinson Affidavit of June 23, 1977, para. 2, 3.]

2. Floyd Robinson was an active, dues paying member of the United Mine Workers of America from the time of its creation in Floyd County, Kentucky until the time of his death on November 18, 1967.

[Complaint, para. 17; Answer, para. 17; Robinson Affidavit of June 23, 1977, para. 4.]

3. The Princess Elkhorn Coal Company and its successor, Princess Coals, Inc., were signatory to the National Bituminous Coal Wage Agreements in effect from 1942 through 1967,

and were contributing the required per tonnage royalties into the treasury of defendant Funds (by said royalty system) from May, 1946 through 1967. Thus, Floyd Robinson was employed by a signatory employer from May 28, 1946 until his death.

[Complaint, para. 18; Answer, para. 19.]

4. On November 18, 1967, five days after his fifty-fifth birthday, Mr. Robinson died at home.

[Complaint, para. 19; Answer, para. 19.]

5. Having worked steadily up until the day of his death, Mr. Robinson had planned, after reaching his fifty-fifth birthday, to retire and collect his Retirement Pension from defendant Funds. Because only five days had elapsed since his fifty-fifth birthday, he had not yet formally retired and applied for said pension at the time of his death.

[Complaint, para. 20; Answer, para. 20; Robinson Affidavit of June 23, 1977, para. 13.]

6. Defendants have credited Mr. Robinson with twenty-five (25) years of "classified service," *including* twenty-one (21) years of "signatory service" (i.e. employment after May 28, 1946 with a Company which was signatory to the effective National Bituminous Coal Wage Agreement, and which, therefore, was contributing the required per tonnage royalties into the treasury of defendant Funds).

[Complaint, para. 21; Answer, para. 21.]

7. Because of his substantial years of classified and signatory service, Mr. Robinson met all applicable age and years of service requirements for a retirement pension at the time of his death, but had not yet applied for the pension when he died. At the time, defendants' Resolution 63 required 20 years of classified service, fifty-five years of age, and one year of signatory service immediately prior to retirement for receipt of a retirement pension.

[Complaint, para. 22; Answer, para. 22; Defendants' Answers, Nos. 3, 4, 5 to plaintiffs' Interrogatories, and Resolution 63 attached thereto.]

8. Plaintiff Gracie Robinson applied for permanent survivor's health benefits, and was denied by defendant Trustees on February 10, 1975. Plaintiff Robinson was notified by defendant Trustees in correspondence dated January 26, 1976 that said denial was final and that no further consideration would be given to her claim for permanent survivor's health benefits.

[Complaint, para. 23; Answer, para. 23.]

9. Plaintiff Juanita Hager's husband, Paul C. Hager, began working in this nation's underground coal mines in 1931. He worked continuously in the coal industry until March, 1968, when he retired and applied for a Retirement Pension from defendants.

[Complaint, para. 24; Affidavit of Juanita Hager dated June 23, 1977, para. 2.]

10. Mr. Hager's said application was granted by defendants, and he briefly received a monthly Retirement Pension and accompanying health benefits from defendants. Being unable to adequately support himself and his family on said pension, Mr. Hager returned to work in the coal mining industry in October 1968, thereby discontinuing said pension benefits. He then worked steadily in the industry for signatory employers until immediately prior to his death in 1971.

[Complaint, para. 25; Answer, para. 25; Affidavit of Juanita Hager dated June 23, 1977, para. 3.]

11. Mr. Hager died on March 22, 1971. His death followed complications which developed after an operation for gallstones. A biopsy performed after Mr. Hager's death revealed that, at the time of his death, he was suffering from coal worker's pneumoconiosis.

[Complaint, para. 26; Answer, para. 26; Affidavit of Juanita Hager dated June 23, 1977.]

12. Mr. Hager worked for approximately thirty-nine (39) years in the coal industry. Specifically, he worked with three (3) companies, the Northeast Coal Company at Auxier, Kentucky; the Princess Elkhorn Coal Company (and its successor

Princess Coals, Inc.) at David, Kentucky; and, the Patsy Development Company, Inc., at David, Kentucky. All of Mr. Hager's twenty-four (24) years of work in the coal industry after May 28, 1946 (the date of the creation of defendant Funds) was for employers who were signatory to the National Bituminous Coal Wage Agreements; and, who were, therefore, contributing the required royalties into the treasury of the defendant Funds.

13. At the time of his death, Mr. Hager was an active, dues paying member of the United Mine Workers of America, and had been a dues paying member of that Union since its inception in Floyd County, Kentucky.

[Complaint, para. 28; Affidavit of Juanita Hager, June 23, 1977, para. 9.]

14. Paul Hager met all applicable age and years of service requirements for a retirement pension at the time of his death, but had not re-applied for a pension prior to death. At the time of Paul Hager's death, defendants' Resolution No. 83 required 20 years of classified service, fifty-five years of age, five years of signatory service, and one year of signatory service immediately prior to retirement for receipt of a retirement pension.

[Complaint, para. 29; Answer, para. 29; Defendants' Answers Nos. 2, 3 to plaintiffs' Interrogatories, and Resolution 83 attached thereto.]

15. Plaintiff Juanita Hager applied for permanent survivor's health benefits, and was denied by defendant Trustees on April 28, 1975. Plaintiff Hager was notified by defendants in correspondence dated February 4, 1976 that said denial was final and that defendants would give no further consideration to her claim for survivor's health benefits.

[Complaint, para. 30; Answer, para. 30.]

16. Under Article II, E(1)-(4) of the defendant 1950 Benefit Plan and Trust, in order for an unmarried surviving spouse and surviving dependents of a deceased coal miner who died prior to December 6, 1974 to be eligible to receive permanent

survivor's health benefits, the deceased miner must have fallen into one of the following four categories:

(1) the miner died as a result of a mine accident which occurred after May 28, 1946, while the miner was working in a classified job for a "signatory" employer; or,

(2) at the time of his death, the miner was unemployed, permanently and totally disabled, and had been awarded Workmen's Compensation Benefits for an injury or occupational disease sustained prior to December 6, 1974, as a direct result of classified, signatory employment after March 5, 1950; or,

(3) at the time of his death the miner was receiving a retirement or disability pension;

(4) at the time of his death, the miner was unemployed and permanently and totally disabled as a result of a mine accident which occurred after May 28, 1946 prior to December 6, 1974, while the miner was employed in a classified job for a "signatory" employer; and, the miner was eligible for a Disability Pension.

[Complaint, para. 31; Affidavit of Robert T. Boylan dated June 8, 1977, Appendix E.]

17. Plaintiffs' applications for permanent survivors' health benefits were denied by defendant Trustees solely because their decedents had not ceased work and filed written applications for pensions prior to their deaths.

[Complaint, para. 32; Defendants' Answers to plaintiffs' Interrogatories No. 2 and No. 4.]

18. As a result of defendants' denial of plaintiffs' applications for survivor's health benefits, plaintiffs have been financially unable to obtain or afford the medical treatment which they need. Without said permanent health benefits, plaintiffs have already, and will be forced to forego necessary medical treatment, and will suffer irreparable damage.

[Complaint, para. 34; Affidavit of Juanita Hager dated August 26, 1977, paras. 7-11.]

Respectfully submitted,

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III.

5. Affidavit of Juanita Hager

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et al.*
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*
Defendants.

Affidavit of Juanita Hager

Now comes the affiant Juanita Hager, and having been duly sworn, states on oath the following:

1. I am one of the named plaintiffs in the above styled case;

2. I am making this affidavit in support of plaintiffs' motion for certification of the class in the above styled case;

3. I reside at Auxier, Floyd County, Kentucky; I am fifty-nine (59) years old;

4. Since approximately January 1, 1977, I have been receiving Medicare, pursuant to my receiving Social Security Disability benefits;

5. My Medicare coverage is the same as is provided to a person receiving Old Age Assistance from the Social Security Administration;

6. I have been keeping records of my medical expenses for some time. I have no medical insurance or other means of paying for medical expenses besides that provided by Medicare and my own limited income;

7. From January 1 through July, 1977, I incurred approximately $180.55 of medical expenses which were *not* covered by Medicare and which, to the best of my knowledge, would have been covered by the United Mine Workers of America Medical

Card. This expense amounts to $119.55 expended on medicine and $61.00 expended on visits to my physician's office;

8. Because of my heart condition and other medical problems, I am required by my physician to have several laboratory tests each year, these including a thyroid test, stress test, EKG, and others. This year alone, I have foregone any such tests or examinations because Medicare will not pay for these tests and I cannot afford to pay for them myself. Based on my past experience, and on the instructions of my physician, I estimate that the cost of these tests would be approximately $300. I will have no choice but to put off these tests until I have some means of paying for them;

9. Additionally, I have limited my expenses for medicine by purchasing only one-third of the medicine prescribed by my physician, thereby cutting the cost of my medicine approximately $5-10 per month. This course of action is necessary because the medicine is not covered by Medicare, and I cannot afford to purchase the full prescription;

10. Thus, since January 1 of this year, I have incurred the $180.55 of medical expenses for which Medicare did not pay; and I have simply refused the additional necessary medical tests, amounting to a total of approximately $480.55 in medical expenses not covered by Medicare from January 1 through July, 1977.

11. The expenses and tests mentioned above represent a period of time during which I have not entered a hospital and have not experienced any particularly acute medical episode or condition. In other words, had I been forced to enter the hospital during the past seven (7) months or should that occur in the remaining months of this year, my total medical expenses this year not covered by Medicare would be substantially higher than the figures mentioned above.

Dated: 26 August 1977.

III.

6. Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et. al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Defendants.

NOTICE OF APPEAL

On this 18th day of July, 1978,

Notice is hereby given that Gracie Robinson and Juanita Hager on behalf of themselves and all other persons similarly situated, plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 22nd day of June, 1978 in favor of the Defendants.

July 14, 1978.

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IV.

TRANSCRIPT OF HEARING BEFORE THE HONORABLE GERHARD A. GESELL, UNITED STATES DISTRICT JUDGE

June 14, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-698

GRACIE ROBINSON, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Defendants.

Washington, D.C., June 14, 1978

The above-entitled cause came on for Hearing before the HONORABLE GERHARD A. GESELL, United States District Judge, at 9:30 a.m.

Appearances:

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LARRY SWORD, Esq.,
Prestonsburg, Kentucky,
Counsel for Plaintiff Appalachian Research and Defense Fund of Kentucky, Inc.

WAYNE MOORE, Esq.,
Washington, D.C.
Counsel for Plaintiff Legal Counsel for the Elderly

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

Copy For MR. PARSONS

Appearances:

HENRY S. RUTH, JR., Esq.
TIMOTHY J. PARSONS, Esq.,
LAURA KUMIN, Esq.,
Counsel for Defendants

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[4] **PROCEEDINGS**

THE COURT: Good morning.

THE CLERK: Civil Action No. 77-0698, Gracie Robinson, et al., v. United Mine Workers of America Health and Retirement Funds, et al. Mr. Steven J. Millemann, Mr. Wayne Moore and Mr. Larry Sword for the Plaintiffs. Mr. Timothy J. Parsons, Mr. Henry Ruth and Miss Laura A. Kumin for the Defendants.

THE COURT: I guess the record should show, gentlemen, that following the Court's last memorandum in this matter the Court was advised by counsel for the Funds that there had been some evidence developed that might relate to the interpretation and decision here and, accordingly, this hearing was set to take testimony.

How many witnesses are we going to have?

MR. PARSONS: For the Defendants, we have two, Mr. Pierce and Mr. Haynes.

MR. MILLEMANN: For the Plaintiffs, Your Honor, we have Mr. Bethell.

THE COURT: All right, fine.

I have been assigned in an emergency-situation way to a three-judge election case that is going to take up my afternoon. So I am anxious if possible, without inconveniencing counsel, to complete the testimony this morning.

MR. PARSONS: I think that is possible, Your Honor. [5] We will move promptly.

THE COURT: All right, thank you.

You may go ahead.

MR. PARSONS: Your Honor, the Defendants will call Mr. Donald Pierce.

Whereupon—

DON PIERCE

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you state your name and present address, please.

A Don Pierce, 33 Grandview, Radford, Virginia.

Q Who is your present employer?

A I am self-employed as a consultant.

Q To what organization are you a consultant?

A I am working for the United Mine Workers of America.

Q Mr. Pierce, in 1974, were you employed by the United Mine Workers of America?

A Yes, I was.

Q In what position were you employed?

A In the Research Department as Assistant Director of Research.

Q In that position, what were your duties and responsibilities?

[6] A I did economic analysis of energy-related matters for the union; prepared materials for collective bargaining; did analysis of state-of-art of sulphur dioxide control, and other pollution-control equipment and a variety of other financial and economic analysis in a variety of financial and analytic areas.

Q When did you commence your employment with the United Mine Workers?

A In March of 1972.

Q What is your educational background?

A I have an undergraduate degree in philosophy from

West Virginia University and a master's degree in economics from the University of Michigan.

Q With your master's degree, was there any sub-specialty or area of concentration?

A I did specialize in natural resource economics at Michigan.

Q During your employment with the United Mine Workers in 1974, did you participate in the negotiations of the National Bituminous Coal Wage Agreement in that year?

A Yes, I did.

Q In what capacity did you participate?

A I participated as a technical staff person to the Health and Retirement Fund Subcommittee and also to the main table negotiators primarily responsible for doing economic [7] analyses on items that would affect cost in the contract, and with respect to the Subcommittee on a variety of pension and health matters.

Q Did your duties encompass the preparation of union demands for the bargaining?

A Yes, they did. Earlier in 1974, Tom Bethell, who was Research Director, and myself conducted a series of conferences in the various districts of the union, at which collective representatives from each local helped to formulate the demands.

We prepared a variety of talks concerning the state of the general economy, the state of the coal economy and particular cost of certain benefits.

I also served as a staff person at the union's convention in 1973, I believe in the fall, to the Collective Bargaining Subcommittee, which reviewed resolutions that had been sent by the various locals to that convention. And finally within the union's Research Department, I helped prepare materials summarizing collective bargaining trends in the industry during the last two or three years; and also served as liaison to Martin Segal, who was the union's actuarial consultant during the bargaining.

Q In the bargaining in 1974, what was the area of responsibility of the Health and Retirement Subcommittee for the United Mine Workers?

[8] A That Committee was delegated by the president of the union, who acted as Chairman of the main Bargaining Committee, to investigate a number of areas: One, the extension of benefits to beneficiaries that were already receiving benefits from the Funds; the establishment of a sound financial basis for the Funds; and the addition of certain new classes of beneficiaries.

As such, the Subcommittee was to meet with its counterpart in the industry and work out structural matters related to providing benefits and financing them.

Q As a staff member, did you have a vote in the deliberations of the Subcommittee?

A No, I didn't.

Q Was Mr. Bethell a member of the Subcommittee staff also?

A Yes, he was.

Q Did he have a vote in the Subcommittee?

A No, he didn't.

Q Did Mr. Huge, Mr. Harry Huge participate in any way with the Health and Retirement Fund Subcommittee?

A Yes, he did. He served as an advisor to the Committee, as did Bill Davis, who was the operators' appointed Trustee to the Funds, provided for by Trustees' resolutions, and served as a mechanism for the union requesting data from the Funds, and also provided general background information [9] concerning the manner in which health and retirement benefits were being delivered.

THE COURT: What was the name of the Subcommittee?

MR. PARSONS: The Health and Retirement Fund Subcommittee, Your Honor.

BY MR. PARSONS:

Q Did Mr. Huge have authority or a role to vote as a member of the Subcommittee?

A No, he didn't.

Q Which members of the Subcommittee had authority to vote?

A There were five members: John Kelly, Nick Halamandaris, Ivan White, Hal Brownfield and John Guzek, each of which was either a District president or an International Executive Board member. All five had one vote. I think Mr. Kelly and Mr. Guzek served as co-chairmen. I am not sure. Mr. Kelly was one of the two co-chairmen.

Q Did the Health and Retirement Fund Subcommittee have authority to make final decisions in the bargaining as to the areas within its jurisdiction?

A No. All final decisions were reserved to the main table negotiators, although with respect to working out what turned out to be a radical departure from the Fund's traditional structure, a good deal of latitude in formulating that structure was left to the members, always subject to the final endorsement [10] of the main table negotiators.

Q Who were the main table negotiators for the union?

A Arnold Miller, Mike Trbovich, Harry Patrick, Chip Yablonski and Rick Bank were the main table negotiators.

Q Can you briefly identify what position in the union did Mr. Miller hold?

A Mr. Miller was president of the union. Mr. Trbovich was the International vice-president; and Harry Patrick was Secretary-Treasurer; Chip Yablonski was the general counsel; and Rick Bank was administrative assistant to Mr. Miller.

Q Now when did the union present its demands, bargaining demands in the health and retirement area to the coal operators?

A Those demands were presented as part of a rather large package in early September to the operators. The material was prepared in a bound form and each section presented a general introductory set of descriptions of the state of the industry or the state of delivery of a particular benefit, and then usually vague demands, not necessarily precisely drawn, were presented as the final part of that section, on an article-by-article basis as related to the National Bituminous Coal Wage Agreement.

Q When did the negotiating sessions between the two subcommittees begin?

A To the best of my memory, it would have been in very [11] late September or early October. I don't recall that exactly.

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 1.

(Whereupon 10/1/74 Memorandum to Brownfield from Miller was marked Defendants' Exhibit No. 1, for identification.)

BY MR. PARSONS:

Q Can you identify that document?

A Yes, I can.

Q Would you describe it for the record, please?

A It is a memorandum to the members of either the International Executive Board or the District presidents, who had been appointed to the Health and Retirement Subcommittee explaining to them the structure of that committee, the staff that would assist them and the areas they were to address. It included as appendices—

MR. MILLEMANN: Excuse me, Your Honor, could we have the witness identify a date or some identifying factor?

THE COURT: Do you have a copy of the memorandum?

MR. MILLEMANN: Yes, we have a copy of several. We don't know which one he is talking about.

THE WITNESS: Dated October 1, 1974, from Arnold Miller to H. A. Brownfield, John Kelly, and so forth.

MR. MILLEMANN: Thank you.

[12] BY MR. PARSONS:

Q You were discussing the appendices.

A Yes. There are two appendices. One which includes the initial demands of the union, an extract from the document I described earlier, and an initial industry response in broad terms to those initial demands.

The industry prepared a general response, also presented in a printed and bound form, to the union's initial presentation of demands.

Q Do you know who prepared that memorandum?

A I am not absolutely certain but I suspect Tom Bethell would have either prepared or helped prepare this for President Miller's office, since the Research Department had been given primary responsibility in these areas and, finally, the type appears to be that which was used in our department.

Q Do you recall having received a copy of this memorandum at or about the time it was dated?

A I can't remember specifically having it handed to me but I am sure I did.

MR. PARSONS: At this time, Your Honor, I would move the introduction of Defendants' Exhibit 1 into evidence.

THE COURT: What portion of it relates to the issue before me?

MR. PARSONS: Specifically, Your Honor, on Page 2, the portion setting forth the Subcommittee jurisdiction; on [13] Page 3, the initial demands, bargaining demands made by the union; and then the initial response of the industry, to show the starting point of the negotiations; and then we will go through the process of that.

THE COURT: All right. It will be received.

(Whereupon Defendants' Exhibit No. 1 was received in evidence.)

BY MR. PARSONS:

Q Mr. Pierce, in its initial demands, did the United Mine Workers propose permanent health care for widows?

A Yes, it did. It proposed something even further than that. It proposed the extension of partial pensions to widows, which would have carried with it attendant health care.

Q Now did it propose this for widows of certain groups of miners?

A Yes. It proposed this for a variety of groups of widows: For widows in the future and for widows of miners who had been pensioned in the past but had died, and finally for widows of miners who would have been eligible for pensions save for their failure to retire.

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 2.

(Whereupon Memorandum captioned Summary UMWA Proposals and BCOA Counterproposals as of 10/16/74, was marked Defendants' Exhibits No. 2, for identification.)

[14] BY MR. PARSONS:

Q That is a memorandum captioned, Summary UMWA Proposals and BCOA Counterproposals as of 10/16/74.

Can you identify that document?

A Yes, I can. It was one of a number of such summaries that was prepared by the Research Department of, I should say, the staff to the Health and Retirement Subcommittee, detailing what the current status of negotiations was on various matters in Subcommittee.

Q Did you participate in the preparation of this document?

A Yes, I did.

Q Was that document presented to the BCOA or discussed at negotiations of the Subcommittee?

A I believe this particular one would have been handed out to the BCOA. There were, as I said, a variety of these, some of which were used internally by the union, but periodically, so the Subcommittee would be aware of just where it stood on a variety of issues, the two sides exchanged documents detailing what they thought the current positions of each were.

Q Directing your attention to the third page of Defendants' Exhibit No. 2, for identification, does the third page cover the subject of benefits for widows?

A Yes, it does. At this stage of the bargaining, the [15] union was still demanding pensions, the extension of pensions of a partial nature for widows and would have also included health care.

Q If widows had been given a pension, would that have carried with it automatic health coverage?

A We felt that it would since the Trustees of the Funds had always proceeded to provide in the past health benefits to anyone receiving a pension except for certain exclusions for those earning moneys above a given level.

Q Specifically once again directing your attention to Page 3, does that, to your recollection, set forth the status of the union demand and the industry response on that issue as of that date?

A To the best of my remembrance, it would. Given the fact that it is dated, I don't recall the two sides had disputes as to the summary prepared by the union as to what their respective positions were.

MR. PARSONS: At this time, Your Honor, I move the introduction of Defendants' Exhibit No. 2 into evidence.

THE COURT: It will be received.

(Whereupon Defendants' Exhibit No. 2 was received in evidence.)

BY MR. PARSONS:

Q Now, Mr. Pierce, at what time did the industry respond to the union's bargaining demand for health care and [16] pensions and other benefits for widows?

A Well, I think in its initial response, the one that is in Defendants' Exhibit 1, there is a response to that area; and then continuing thereafter in Subcommittee sessions, the industry would have responded generally serially to the variety of issues outstanding.

It may be the case that in some Subcommittee meetings only one particular area was discussed so that, say, the item of health care for widows would not have come up. But in general the Subcommittee was continuously working and debating all of the union's demands and the industry's counterproposals.

Q What was the nature of the industry response to the demand for coverage of widows?

A The industry had no desire to extend initially pensions, of course. Then when the union modified its demand primarily to health care, nor health care to a new class of beneficiaries which had the potential to be as large as that of the past widows of pensioned miners.

THE COURT: Well now, I am looking at this No. 2 at Page 3 and I don't see anything relating to this subject matter.

Will you point it out to me.

THE WITNESS: Page 3?

THE COURT: Yes. Counsel directed your attention [17] to Page 3 of Exhibit 2 and said, doesn't that show the response.

Which one is it?

MR. PARSONS: It is in the left-hand column, the top half of the page, Item No. 3, which reads:

> "Working or pensioned miners who died prior to effective date of contract: Widow receives $1,000 one-time and retains 85-HS. . ."

Which is the hospital part, which signifies eligibility for health benefits.

". . . until death or remarriage.

THE COURT: But that is the pension plan.

MR. PARSONS: Yes, that is.

THE COURT: That is miners eligible for pension. That is pensioned miners.

MR. PARSONS: The purpose of the examination is to show that that was not the union's initial demand. The union started out broader and then went down to a narrower issue; and there were further negotiations along the course.

THE COURT: You lost me. This doesn't cover the class that we are talking about here, does it?

MR. PARSONS: It is broader than the class.

THE COURT: It is narrower.

MR. PARSONS: To begin with and then it narrows down specifically to the group.

[18] THE COURT: I don't follow you. It doesn't include miners eligible for pension, does it?

MR. PARSONS: Maybe if I—

THE WITNESS: Your Honor, if I might speak to that.

THE COURT: I need help.

THE WITNESS: Idon't know if I can provide it.

In Item (3), working miners who died prior to effective date of contract, if one looks back at Defendants' Exhibit 1, you will see a more detailed description of that group.

That is miners who were working at the time of their death. Item 10 on Page 3 would speak to that. And I think there is a further description somewhere within this document.

THE COURT: That says, Extended coverage for all widows.

We are steamrolling along here and I began to look at the exhibits and I don't follow it.

MR. PARSONS: The point I am attempting to make in my examination, Your Honor, is that the union demand was initially broader than the class we are talking about and would have covered the widows of all miners who died.

THE COURT: You go ahead. It seems to me narrower because it doesn't seem to include this class.

MR. PARSONS: All right, Your Honor. I will pursue this with Mr. Pierce.

[19] THE COURT: You have to develop that some way or another. It doesn't seem to me pensioned miners would include miners eligible for pensions. I would think pensioned miners would be people who had received pensions.

MR. PARSONS: I agree. Let me ask Mr. Pierce.

BY MR. PARSONS:

Q Did the union's initial demands for health care for widows, did they include a group or as a part of the over-all group the widows of miners who were working at the time of their death but were eligible for pensions?

A Yes, it did.

THE COURT: And where is that in this Exhibit 2?

THE WITNESS: Well, the words, "working miners," as contrasted with, "or pensioned miners," would have included a demand for health care for those widows of men who would have been pension eligible save for the fact that they were working at the time of their death.

As a matter of fact, in the union's initial demand, it would even have been broader. It would have extended to the widows of men who were working and were service eligible for a pension and not age eligible. That is to say a miner who was fifty-three years of age but had twenty years of service and who died, our initial demand would have included a widow's pen-

sion and, of course, the health care that went with it, for his surviving spouse.

[20] BY MR. PARSONS:

Q During the course of the Subcommittee negotiations, did the union modify its demand with respect to the request for pensions and health care for widows?

A Yes. The union modified the demand after establishing a structure which provided for a new pension system, part of which would have provided pensions for future surviving spouses and as a matter of course health care, since the union continued to push for the incorporation of past Trustees' resolutions as part of the basis for designing the new structure.

Realizing the large costs which would be involved in extending pensions to this possibly large group of past widows on a retroactive basis, the union dropped the demand in which it had requested partial pensions for that group of individuals and began concentrating on health care for them.

Q Did the industry respond to this demand by the union?

A The industry's response was still that they had no interest in increasing the size of that beneficiary class.

Q The beneficiary class meaning?

A Of widows for health benefits, for what would have by that time been the group of people who were to be covered under the 1950 Health Trust.

Q Were there two groups of beneficiaries established [21] for purposes of negotiating benefits?

A Yes. Reasonably early in the negotiations, the two parties decided that in order to get the Pension Funds and Health Funds on a firm financial footing and also to meet the new requirements of ERISA which has just been passed that a reasonable approach would be to look at past liabilities, that is, existing liabilities in the way of service, and to draw the line with respect to a given date and separate working and pensioned miners by virtue of that time line.

The decision to choose January 1 of 1976, which was the time that was chosen, was one that was based upon giving miners who were currently working a reasonable chance to decide if they wished to participate in the new pension system which would provide substantially larger benefits for them in the way of pensions if they had a large number of years of service rather than to arbitrarily select the effective date of the agreement and preclude some miners who might have many years of service.

The negotiators at the Subcommittee level and at the main table level both realized that choosing any given date might have some degree of unfairness associated with it but that it was a necessity if one was to fix a point in time with respect to liabilities that were accruing as a result of service, particularly with respect to pensions.

[22] Q Were these two groups known as Group A and Group B?

A Yes. Since we had not come to an agreement as to what the new Trusts, which were to be a continuation of the old Trusts, would be referred to, we generally referred to the two groups of people I have described as Group A and Group B. Usually in capital letters.

Q Did Group A ultimately become the group of beneficiaries that was covered by the 1950 Pension Trust and the 1950 Benefit Trust?

A I don't recall if A became the future and B the past. I know there are further documents and that should be clear there.

Q Are you familiar with the definition of the class in this case?

A I think I am, yes.

Q What is your understanding of the definition?

A As related to me by yourself and from reading His Honor's stipulation, we are speaking of the widows of miners who would have been eligible for a pension save for the fact that

they were working at the time of their death. That is to say, miners who were age eligible and service eligible for receiving a pension except for the fact that working in the industry precludes one from receiving a pension.

Q Now did the union demand in the course of bargaining [23] permanent health care coverage for the widows of such miners?

A Yes, it did.

Q What was the industry response to that demand?

A The industry response was and continued to be, no, throughout the course of negotiations.

I think it is only fair to say, if I may, that in general the union's initial demands, as can be seen by the attachments on Exhibit 1, were very broad; and during the course of Subcommittee deliberations the two parties often defined classes or benefits much more analytically in order to make it possible to discuss what levels of benefits were to be extended and to just to whom they were to apply.

For instance, we talked about disability very broadly and the extension of disability pensions to people who had been disabled in the mines during the period '46 to '74. Gradually it became clear that a better definition of disability was a mine accident, with the union initially insisting on occupational diseases such as black lung being included in the definition of mine disability.

Similarly, with respect to the classes, the industry took the lead in insisting that they be very tightly drawn with respect to time, since the primary criterion for establishing under what Trusts one's benefits were to come was a function of time and further to establish the particular qualifications that were necessary for receiving a benefit such [24] as—

THE COURT: Did you ever identify how many people would be in the class?

THE WITNESS: We made attempts to identify the numbers of persons in each of the variety of classes we were discussing, whether it was pensions—

THE COURT: I am interested in this class.

Did you ever attempt to determine how many people were in the class or what it would cost?

THE WITNESS: Yes, we did, Your Honor.

THE COURT: Can you recall any of those determinations as to how many members, how much it would have cost, how many people were in the class?

THE WITNESS: I can try to go through the process we used and give you an idea of the manner in which we attempted to identify them.

We looked at the Funds annual summaries of working miner populations. We looked at mortality tables, both for miners and for women. We looked at what was currently the case with the number of men who were working who were past the current pension age. And using those factors, we made some projections on what the size or the likely size of a population of widows might have been.

Then we made some consideration of the fact that during the '50's and '60's a large number of people left the [25] industry and perhaps went back to work in non-union mines and in many cases never received a benefit.

A large number of that population was, of course, addressed and restored to benefits by virtue of the Blankenship decision.

Using those factors, each side independently—each side being the union and the industry—came up with estimates as to what it thought the size of the population would be.

Our feeling at the union was that the general class of widows to whom we wished to extend benefits was somewhere in the neighborhood of 40,000, with a margin of error that was quite large.

The industry thought that that thinking was surely within

the range that it had projected, as I recall, but felt that there was a great degree of uncertainty, perhaps more so than the union, since we were not to be the ones to finance the benefit, with respect to ascertaining it.

With respect to the specific sub-class we are talking about, the Funds kept up until that time only manual records on the receipt of death benefits, which would have been the best measure one could have used to identify people who had received a death benefit, were working at the time of their death but would have had the number of years of service requisite for receiving a pension.

[26] However, at that time, unless I am incorrect, it would have been extremely difficult, because of the state of the Funds' records, to have pulled all of those records. Even if one had, he would have faced the fact that there was never the systematic determination of years of service done for those people that was done for a regular retiree.

Since the widow would have submitted an application requesting only a death benefit and the criterion was only that he be working or had worked within a given interval.

So to claim that we did either sophisticated or even very accurate analysis would be incorrect. But we did, by looking at the total numbers involved—at least as I recall, my feeling was, and I did most of the work for the union, that the size of this class of widows might be as much as ten per cent of the 40,000 or perhaps an additional 4,000 individuals.

Realizing—

THE COURT: Was that figure on the bargaining table?

THE WITNESS: I don't recall that we ever advanced it as a number at all.

As a result we looked at this class as maybe adding a small additional amount of money to the total cost of benefits for widows and in itself not a large number.

I don't recall the particular numbers but it would have been

somewhere in the neighborhood of ten per cent of [27] whatever we saw the cost of widows adding.

Similarly with respect to this particular group especially, neither side argued the case so much on the merits of the exact size of the class.

The union, as I recall, argued it largely—I don't know if I should go beyond your request on the numbers—argued the matter of health care for these individuals on an equity basis, that they weren't substantially different from other widows, that while they had received a larger death benefit by virtue of being the surviving spouses of working miners, that the present value, even the present value of that death benefit, if brought forward from fifteen or twenty years ago, was not comparable to what the value of health benefits would be in the future.

The industry, as I recall, argued that with respect to fairness and equity that because the class had been treated differently, it had received the working miner death benefit, that it had no desire to extend further the health card and that, indeed, if one argued for a class such as this, then one could argue for the widows of those who were within one year or two years of retirement.

That is eventually when the union had to realize there would be lines drawn with respect to the classes as well as with respect to time.

We continued, often heatedly, over this particular [28] issue, I remember—

THE COURT: Sort of a camel's nose under the tent argument from the operators. You start doing this, then you can go back and back and back.

THE WITNESS: Exactly. This is an inference on my part but I also, not having had that much experience in bargaining before, saw it as perhaps this is a class that one looks for in the next round of negotiations, as is the idea of extending the definition of disability.

THE COURT: Eventually it was given up.

THE WITNESS: Yes.

THE COURT: By the union.

THE WITNESS: Yes.

THE COURT: What did the union get in return for giving it up, if anything?

THE WITNESS: I am not sure you could say the union got a trade-off for any specific item of this sort. We had a variety of people, a wide variety of benefits and new benefits that were being added and extending old benefits to higher levels or longer periods of time.

So that to say, for instance, we gave up this small class or smaller class of windows for an extension of disability care for a certain group of miners, I don't think we ever did that.

The Subcommittee tried to stay away from that, [29] particularly the men who were the elected officials, because they, I think, had a natural aversion to trading benefits among potential beneficiary classes and felt that really while they would try to include as many people as possible they never wanted to say, We left you out because we could get them in.

So I don't really think in the Subcommittee meetings things were generally approached in that manner.

Of course, with respect to pension levels, obviously, each $10.00 one added to, say, the pension of a past miner meant that there was a relatively smaller amount of money to be allocated to health care and to some other area.

Finally there is the general question of whether or not the industry, even if it had given us five cents a ton or five cents an hour larger package, would have allocated that money, even if the union had desired to, to health and retirement benefits.

While the union was represented largely by older elected officials and people who had been closely in contact with the problems of Appalachia in the '50's and '60's, there was the phenomenon of many many new and young people being hired in

the industry and the fact that there needed to be something attractive for them and pensions and health care for these sorts of people are far away in their minds often.

[30] BY MR. PARSONS:

Q Mr. Pierce, I am going to hand you a copy of what has been marked as Defendants' Exhibit No. 4, for identification.

(Whereupon Memorandum as of 9:00 a.m., November 8, 1974 on Unresolved Issues in Bargaining was marked Defendants Exhibit No. 4, for identification.)

BY MR. PARSONS:

Q That document is a Memorandum as of 9:00 a.m., November 8, 1974 on Unresolved Issues in Bargaining.

I ask you, can you identify that document?

A Yes, I can.

Q Do you know who it was prepared by?

A I don't know for sure whether or not we prepared this one in the Research Department, which would have meant Tom Bethell would have.

There were a variety, as I said, of these summaries prepared both internally for the main table and further for the Subcommittee's use; and initially other members of the main table, Rick Bank, or his officer, Chip Yablonski, might have prepared some of them.

Gradually, I think, Tom Bethell took over in the Research Department not only the responsibility for preparing the description of the state of affairs with respect to health [31] and retirement benefits but the larger package of total issues.

I don't recall whether or not this one—

Q This memo covers the status of all issues in the bargaining, does it not?

A Yes.

Q Turning your attention to Pages 5 and 6 of the Exhibit.

A Yes.

Q In that section, does that cover the issues that were open or outstanding in terms of the Subcommittee's negotiations?

A Yes. I am sure it covers all the major issues.

As you know, when one is working on fine definitions of groups of people or of size of benefits, to summarize things in one line might not be totally adequate. But this would be all of the major outstanding issues that had significant cost factors as we saw it attached to them.

This would have been prepared by Tom Bethell and myself for inclusion, even if we didn't prepare the total document.

Q Directing your attention to Page 6, and specifically Item No. 7 at the top of the page, does that, to your recollection, present what was the state of the union's demand for health care coverage for widows as of that date?

[32] A Yes, it does.

Q And of the groups that were being proposed for coverage as of that date is, to your understanding, the Plaintiff class in this case included?

A Yes, it would be included under (a).

Q How is that described?

A As miners who were working at the time they died in the period '46 to '74 but were eligible for pension except for the fact that they were working at that time.

Q Was this memorandum, to your recollection, an accurate statement as of the date it was prepared?

A Yes.

MR. PARSONS: At this time, Your Honor, I would like to move the introduction of Defendants' Exhibit No. 4.

THE COURT: It will be received.

(Whereupon Defendants' Exhibit No. 4 was received in evidence.)

BY MR. PARSONS:

Q I think you have stated that the industry was opposed to the extension of health care to widows, is that correct?

A That is correct.

Q Did they give reasons in support of their position?

A I think in my sort of discussion earlier, I have indicated that they did.

[33] They were not anxious to increase the size of beneficiaries for health care.

You have to remember that that Fund, that is, health care for those individuals, was to continue to be funded on a cents-per-ton basis, which caused some difficulties for the varying members or, at least as I understand it, in the industry since such a funding mechanism falls more heavily on those, say, that produce coal by stripping than it does those who produce coal in deep mines.

Further, it represented providing benefits to many people—and this is an important point, I think, or it seemed to be in the industry's argument—who were either not their employees during the period or who perhaps only worked a part of the time that they were in the industry.

Part of the reason that the industry had for establishing the new health and pension plans was to try to limit benefits as much as possible to those persons who were employees or the dependents of their employees.

Finally, the industry felt that since this group of widows had received a working miner's death benefit, that they had been treated differently with respect to the general class of widows we were seeking to extend benefits to and, hence, different from the parallel class, that is, future widows, who would be receiving a health benefit by virtue of having received a pension or their husbands having received [34] a pension and then they a survivor's spouse pension.

Q The surviving spouse pension that was provided in the pension plan, that was to cover future retirees and active workers?

A Yes. ERISA required the provision of an option for a joint survivor's annuity but we had bargained for something more for miners other than for vested miners. That is, an automatic fifty per cent surviving spouse benefit. And had insisted that, of course, either the fact the miner was receiving the pension and his widow or surviving spouse would receive a pension, either through the joint survivor annuity option or through the fifty per cent guaranteed pension, that she would receive health care.

Q In its opposition to this demand by the union, did the industry cite any concern as to the number of persons it thought might be included?

A Yes. I think the concern for this group was part of the over-all concern for estimating the size of the population of widows and of even the disability class of persons to whom additional benefits were to be extended.

Adding this class would only further increase the uncertainty and would most certainly increase the total size. The exact magnitude of increase wasn't certain.

Q Were there discussions at the Subcommittee level of the union's demand and exploration of the industry's grounds of [35] opposition?

A Yes, especially towards the end.

Since this group didn't proceed as one might often do in collective bargaining, that is, withhold a large number of issues, but rather because of the magnitude of the task of setting up new Health and Retirement Funds, resolved early on a number of structural questions, on the decision to include new groups or to extend benefits, for instance.

I can't be certain but I am sure before this date certain of the provisions of disability care had been decided upon. So that what happened is, as we got nearer to what was an artificial

constraint, that is, the expiration of the old agreement, we were increasingly debating the same issues over and over and often, as I said earlier, somewhat passionately.

Q When you refer to the old agreement, do you mean the National Bituminous Coal Wage Agreement of 1971?

A Yes.

Q And what was its expiration date to be?

A I think it was 12:01 a.m. on November the 12th, '74.

Q If an agreement was not reached between the parties by that date, would a strike ensue?

A Well, actually, a strike would have ensued if the parties hadn't reached an agreement prior to about ten days before that.

[36] So that the union realized that it was already—there was a strike of possible one and a half to two weeks' duration and there was an attempt then at that time to use this constraint of the actual expiration date to cut short the strike as much as possible.

Finally the union had some feeling that even if it had attempted to reach an agreement ten days prior to the expiration date, that miners would have been skeptical that had bargaining not occurred up until the actual expiration date, the union had not pushed as far as it might have.

Q What is the significance of the ten-day period prior to the expiration date?

A The union has a ratification procedure which includes first elected officials approving the agreement; it being sent to the field; and then a voting procedure for rank-and-file miners to speak as to what they think of the agreement.

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 5.

(Whereupon Memorandum, Status of Health and Retirement Fund Issues as of November 9, 1974, was marked Defendants' Exhibit No. 5, for identification.)

BY MR. PARSONS:

Q This is a memorandum entitled, Status of Health and Retirement Fund Issues as of November 9, 1974.

Can you identify that document?

[37] A Yes. It is again another of a series of summaries that were prepared during the period of bargaining. I am sure it is one of the group.

Q Does this, to your recollection, set forth the status of the issues as of that date, November 9?

A To the best of my memory, it does.

Q Directing your attention to Item No. 6, does that cover the demand for health care to widows?

A Yes, it is essentially a restatement of the items in Exhibit 4.

This is a somewhat broader rehash of the shorter group of material in 4.

Q And that shows as of November 9 that was still an unresolved issue?

A Yes, it was.

MR. PARSONS: Your Honor, at this time I would move the introduction of Defendants' Exhibit No. 5 into evidence.

THE COURT: It may be received.

(Whereupon Defendants' Exhibit No. 5 was received in evidence.)

BY MR. PARSONS:

Q Mr. Pierce, I am going to hand you now what has been marked for identification as Defendants' Exhibit No. 6.

(Whereupon Memorandum as of 9:00 a.m., November 10, 1974, on Settled and Unresolved Issues in Bargaining was marked Defendants' Exhibit No. 6, for identification.)

[38] BY MR. PARSONS:

Q This is a Memorandum as of 9:00 a.m., November 10, 1974, on Settled and Unresolved Issues in Bargaining.

Can you identify this document?

A Yes. Again, it is a summary of the outstanding issues that was prepared during the course of the negotiations for the main table bargainers.

Q Does this memo cover all of the issues that are outstanding as of that date, to your recollection?

A To my recollection. Given the title of it, I think it would have.

Q Directing your attention to Page 5 of the Defendants' Exhibit No. 6, for identification, Page 5 covers, does it not, the status of issues with respect to the Health and Retirement Fund?

A Yes, it does.

Q Specifically with regard to Item No. 7, does that, to your recollection, state the status of what was the demand for health coverage of widows as of that date?

A Yes.

Q And at that time was it still an open issue that was unresolved?

A Yes, it was.

Q Were discussions continuing with regard to that demand at the Subcommittee level?

[39] A Yes, they were.

MR. PARSONS: At this time, Your Honor, I move the introduction of Defendants' Exhibit No. 6 into evidence.

THE COURT: It may be received.

(Whereupon Defendants' Exhibit No. 6 was received in evidence.)

BY MR. PARSONS:

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 7.

(Whereupon Memorandum, Unresolved Health and Retirement Fund Issues as of November 11, 1974, was marked Defendants' Exhibit No. 7, for identification.)

BY MR. PARSONS:

Q This is a memorandum entitled, Unresolved Health and Retirement Fund Issues as of November 11, 1974.

Can you identify this document?

A Yes.

Q Is this once again one of the series of memos you have been referring to discussing status?

A Yes, it is.

Q Directing your attention to Item No. 4 on the first page of Exhibit 7, does that state what was the status at that time of the union's demand for health card coverage of certain widows?

A Yes, it is.

[40] Q And does that show that the demand was still open at that time, being opposed by the BCOA?

A I am not sure what you mean by the demand. If you mean the demand for the class in question, it does but it also shows the BCOA at this date had agreed to include one of the groups which we had been asking for the extension of health care to, the widows of disabled miners, although they wanted to limit the class to mine accident disability.

You can note here in the items that the union—this was prepared again as a summary for the main table people—that the UMWA, which in this case would be the feelings or sentiments of the Subcommittee, would be that it could agree to that sort of a definition if we established that the widow was continuing to receive black lung benefits, which I think the law provided.

But as I recall, we weren't positive and wanted to check that question out.

THE COURT: Where you say the UMWA could agree to (b), does that mean you were still maintaining your other positions?

THE WITNESS: Yes, it does.

THE COURT: Right.

MR. PARSONS: At this time, Your Honor, I would move the introduction of Defendants' Exhibit No. 7 into evidence.

THE COURT: It may be received.

[41] (Whereupon Defendants' Exhibit No. 7 was received in evidence.)

BY MR. PARSONS:

Q Now, Mr. Pierce, I am going to hand you a copy of what has been marked as Defendants' Exhibit No. 8, for identification.

(Whereupon UMWA Proposal, 11/13/74 Health and Retirement Benefits, was marked Defendants' Exhibit No. 8, for identification.)

BY MR. PARSONS:

Q This is a one-page memorandum, headed, Health and Retirement Benefits, UMWA Proposal, and is dated November 13, 1974.

Specifically directing your attention to the bottom half of the memorandum, can you identify this document?

A Yes. Another summary as to what the status of affairs was with respect to the Health and Retirement Subcommittee.

Q Does it indicate that any agreement had been reached on the question of providing health cards or health care coverage to widows?

A Yes, it does.

Q Where is that found on the memo?

A Six, seven lines from the bottom:

"Agreement in principle on 85-HS cards to widows."

[42] Q Would you relate to us your understanding of what was the agreement in principle as of November 13, 1974?

A My memory would be that we agreed to extend the health cards or to restore the health cards to the widows of miners who had been pensioned during the period '46 to '74; and further, to extend it to the widows of miners who were disabled during that period but had subsequently died; and further, to extend it to the widows of miners who were still alive but on pension that would fall in the old group, that is, the 1950 Trust, upon their death.

Q By this time had any agreement been reached on the union's demand to provide health care coverage to the widows of miners who were working but eligible for pension at the time of their death?

A To the best of my knowledge at that time the union had agreed that that group would not be covered.

THE COURT: You agreed to drop it if you had an agreement in principle on the others.

THE WITNESS: Yes.

THE COURT: Right. Were you present when that decision was made?

Do you follow what I am trying to get at?

THE WITNESS: Yes, I understand what you are getting at.

THE COURT: If so, I want to know who said what.

[43] THE WITNESS: I am not sure that I can recall the exact sequence of events that transpired.

Things were somewhat chaotic during the period of November, late November 11 through the morning of the 13th, as I recall.

The main table, which had heretofore primarily concerned itself only with the size of the dollar amount necessary to finance benefits, had in its desire to get final agreement and since the number of issues were gradually being narrowed by the Subcommittee, increasingly had Mr. Bethell or myself or both of us appear at the main table meetings. The industry similarly had Mr. Haynes there to resolve what was outstanding between the two parties.

THE COURT: Right.

THE WITNESS: And from that, of course, became familiar with the outstanding issues themselves.

While the Subcommittee had continued to brief the main table—and I don't recall the last briefing date as to what was outstanding—because of these summaries the main table was, of course, apprised of where things stood.

I am not sure that I was present when the main table people decided: We can live with what the BCOA has offered both in the way of moneys and the understanding on their part, from Tom Bethell and myself, that the people that had been proposed and agreed to up to that time by the BCOA could be [44] properly funded by the amounts that had been discussed at the main table.

I can't recall any specific discussion at that moment. There would have been a number of times in which, of course, people were very strongly torn between realizing that some group of individuals, whether it be disabled or a sub-group of widows, might not receive coverage or complete coverage.

THE COURT: You can't really remember what was said.

THE WITNESS: I can't recall any specific conversation.

THE COURT: All right.

THE WITNESS: The main table acted largely to clean up a large number of issues, as I recall, to accept an industry proposal right at the very end.

BY MR. PARSONS:

Q To your recollection, was there any relationship between the resolution of the issue of widows and the resolution of any other issue pertaining to the Health and Retirement Fund?

A Would you restate that, please?

MR. PARSONS: Could you read the question back, please.

(Whereupon the pending question was read by the reporter.)

[45] THE WITNESS: Other than the general idea that if we could agree to the groups of widows that were to receive benefits, that is, those of already pensioned miners or disabled miners or future pensioned miners, and agree to exclude the other group, that we had an agreement on that general area, no.

You mean, was there a decision: O.K., we will trade off this group of people for some benefit or for some larger pension amount. No, I don't recall any trade-off of that sort.

Q Just to pursue this a little further, was there any relationship between the resolution of this issue and the agreement or final agreement on the amount of the royalty to be paid into the Fund?

A Yes. Since the industry and ourselves, while we had some minor dispute as to, for instance, how much would be left over for a margin of error or surplus amount in the various Funds, the industry particularly was pushing hard the idea that the level of $1.55 or equivalent in tonnage amounts that the classes they proposed were all that could be covered.

Prior to that we had discussed including sickness and accident benefits in the Health and Retirement Funds. Very late in the bargaining the union agreed to take that benefit out and make it a private insurance benefit.

So an earlier aim of the union at $1.60 got reduced [46] to the $1.55 level.

There was some concern and some dissension among the members of the Health and Retirement Subcommittee and the

staff whether or not, if we held out further, it might not be possible to get a few more cents for additional benefits and whether or not that money would have been applied, say, to this class or to an additional few dollars of benefit for pensions, or some other area.

I don't recall. But I know there was a feeling that we could hold out for more. But the main table people felt that this particular area—or at least I assume they did; I can't speak for them—but that this particular area of people and benefits and the amounts to finance it were satisfactory as a part of the total economic package.

Q When the agreement was reached as to the amount of the royalty, were there any further negotiations on benefits to be provided to various groups?

A Well, other than the inevitable problems which arise when you are trying to write Trusts and Plan documents and define people, there were not substantial new proposals by the union, but the selection of a date, or the exact definition of a term, sometimes it would or would not include certain groups of people, depending on how it was drafted.

So that continued up until the time that the Plan and Trust documents were finished.

[47] Q After the agreement on the royalty and as to coverage of widows, there were no more proposals to include additional groups of beneficiaries, is that your recollection?

A Not as a substantial, as I said—

THE COURT: You had some language problems but you didn't bring this group back for further discussion, is what he is saying

MR. PARSONS: Yes, Your Honor.

THE WITNESS: To the best of my knowledge. I did not participate in all the drafting sessions. It is possible there was, if we write this this way, we could really include these people, by the attorneys in drafting this. But I can't speak to that.

MR. PARSONS: Thank you.

I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. MILLEMANN:

Q Mr. Pierce, you have testified that the industry, to your recollection, was taking a position that they needed to provide certainly attractive benefits to active present employees in order to have an attractive package for them.

Didn't the union also feel some pressure or didn't in fact you on the Subcommittee feel some pressure to provide for "future widows," those being the present wives of active persons?

[48] Didn't you feel some pressure to provide for them ahead of retirees?

A No, I am not sure that that is the case. We were relying largely on the mandates of the convention, which spoke about widows in general, and also on those district conferences which I described, where there had not heretofore existed district classes of future and past widows, as were to arise by virtue of the existence of the new Trusts.

So to say that we felt particular pressure to provide health benefits for future widows, by which I take it you mean 1974 widows, no, because we provided pensions, of course, for the future widows of those people who would remain in the 1950 Trust and who were either receiving pensions or who were to retire in the next two years.

Q Thank you.

I show you a copy of a memo which you have already discussed, which has been introduced, Unresolved Health and Retirement Fund Issues as of 11/11/74.

THE COURT: That is No. 7.

MR. MILLEMANN: Thank you, Your Honor.

THE COURT: Defendants' Exhibit 7.

BY MR. MILLEMANN:

Q I would like you to read Paragraph No. 5, if you would, please.

A Yes.

[49] "Extended 85 . . ."

THE COURT: You can read it to yourself. I have it in front of me.

THE WITNESS: O.K.

BY MR. MILLEMANN:

Q Does that paragraph talk about this group of future widows who would in large part be at that time the wives of active miners?

A This paragraph refers to the widows of working miners.

Q Who would die sometime in the future.

A Who would die sometime in the future and because death benefits were paid on a two-year basis in the past and hence carried health care with them, when we raised the amount of the death benefit during the negotiations, one of the demands was since it would be paid over a period of time we would like to have the health card extended over the same period of time in conformity with the Trustees' general past practice of providing health care so long as one was receiving a death benefit.

Q O.K. The last sentence in this paragraph says:

> "UMWA sees no compromise possible here, views this as potentially dangerous post-ratification issue, especially in southern West Virginia."

What in your recollection is the meaning of that [50] and what in your recollection is the significance of that being only attached to the paragraph discussing future widows and not discussing existing widows?

A I can't recall if there were any particular organizations in southern West Virginia, miners or widows, exclusive of active miners wives who were pushing for this issue. But the

union, through its convention and through what was a rather full-blown Health and Retirement Benefit Committee at that convention, had strongly really endorsed the idea of providing health care for the widows of working miners for the rest of their lives; that is, that the industry had an obligation really for an individual once he entered its employ to continue taking care of his dependents and widow indefinitely into the future regardless of the amount of time he had spent working.

Q All right, thank you.

A And so those groups were very vocal. As you are no doubt aware, the incidence of wildcat strikes led by individuals who were not directly employees of the industry already had taken shape in southern West Virginia, eastern Kentucky, and those areas, particularly in southern West Virginia.

That would be sort of the context I would see that in.

Q O.K. Now the documents introduced by Mr. Parsons [51] indicate the union's proposal as to certain widows and the industry's opposition; and you have commented on what you understood that opposition to be based on.

I guess what I still don't understand is, as of 11/11/74, we had the industry opposing the coverage of widows of working but eligible miners, widows of pensioners and future widows; as of November 13, '74, we have agreement on two of those groups.

You don't really know why, do you, the union decided to accept the omission of widows of working but eligible miners or why the BCOA decided to accept the inclusion of widows of pensioners?

A I surely can't speak of what went on in the minds of the BCOA by virtue of not being privy even to their discussions.

Q Do you know why the decision was made at that point to leave out the widows of working but eligible miners and to include the widows of pensioners?

A I can't say that I know. I might infer that the union somewhere along the line had to make a decision as to how long it could continue to push for what was by then being a growing

length of strike, and that there was only so much money to be had, and that a reasonable effort had been made to include as many people as possible, and it didn't appear that the industry was willing to agree to that group.

[52] Q Now, I show you a document entitled, Exhibit C, United Mine Workers of America 1950 Benefit Trust Agreement, dated 11/11/74, titled, Joint Draft.

THE COURT: What is that? Is that in the record of the case?

MR. PARSONS: It is not an exhibit we have offered. It is an exhibit I furnished to Mr. Millemann.

THE COURT: I mean, it is not before me.

Let's mark it so we know what we are talking about.

MR. MILLEMANN: This is one you gave me.

Would you mark this, please, as Plaintiffs' 1.

THE CLERK: Plaintiffs' Exhibit No. 1 marked for identification.

(Whereupon Joint Draft, dated 11/11/74, Exhibit C. United Mine Workers of America 1950 Benefit Trust Agreement, was marked Plaintiffs' Exhibit No. 1, for identification.)

MR. MILLEMANN: This, Your Honor, is one of the copies provided to us by the Defendants.

BY MR. MILLEMANN:

Q Do you recognize this, Mr. Pierce?

A Yes.

Q Do you know who wrote it?

A I assume it would have been jointly drafted by a variety of lawyers and persons from the industry's subcommittee. [53] Mr. Shanker headed up their drafting section.

Q This was intended, I assume, to represent the state of the agreement as of 11/11 as to a variety of issues?

A No, I don't think so.

Q Tell me what it would include?

A Well, we realized that time was pressing upon us, if we wished to have these Trust documents, and the like, completed by the time there was an agreement and a ratification.

As I recall, we, being the union, insisted on drafting in items which we currently had as demands on the table, telling the industry that if indeed we acceded to their position, it would be easier to excise such items than to have to start and redraft language for them.

I did not read that fully but I would assume—

THE COURT: This was what you hoped to get, in short, and not what you had.

THE WITNESS: What we had, right.

THE COURT: All right, let's move on.

BY MR. MILLEMANN:

Q I guess I am a little confused as to why it is called a Joint Draft if this was just another of the proposals?

A It wasn't a proposal. It was a Joint Draft but the union, as I said, by virtue of the rather good working relationship we had with that Subcommittee, was able to say, Let's write this as we currently have our demands; then if things [54] are changed, which we knew there would be many successive drafts, we will write them as the bargaining comes out.

Q Thank you.

Now apparently from your testimony, Mr. Pierce, there was no real argument by either side in the Subcommittee that you couldn't afford to include in permanent health coverage the widows of miners who were eligible and working at the time of death, was there?

You testified, I believe, that there was really no argument about numbers, if I characterize your testimony correctly.

A I don't think that is what I said. What I tried to indicate was there was a great deal of discussion about the uncertainty as to the size of groups of people and that that uncertainty, of course, was increased by every additional group that you added that was difficult to define, and that of course then the costs associated with those groups were either unable or only predictable on some statistical basis; and as a result, there was a constant argument about the cost of even providing a benefit for a very small group, for instance, those disabled, the widows of disabled miners, which we knew couldn't exceed a given number.

Q The Subcommittee did propose both an estimate of cost and an estimate of the size of the group of widows of working but eligible miners, did they not?

[55] Did not you testify that you provided an estimate or you made—

THE COURT: He said he made an estimate of 4,000 or ten per cent of a ball park figure of 40,000, and that nobody knew whether the 40,000 was right or the 4,000 was right.

BY MR. MILLEMANN:

Q In your opinion, this language, "working but eligible," which comes up in some of the later documents that Mr. Parsons introduced, would that include the widow of a miner who reached requisite retirement age and had the requisite years of service, left the industry, say, because of sickness, and lingered for a while, and then died without applying?

A The individual was working, had age and service, left the industry—so he was not working. Excuse me.

Q Was not working at death. Would that "working but eligible" class, as of your understanding of it at the time, have included that person?

A I don't recall. That would be depending on how one defined the term, deferred vested in the Plan document.

Q So it might have?

A The word, "working" here was a loose word.

Q O.K. Was there a reserve fund of some sort bargained into the 1950 Benefit Trust?

A As I recall, we built in a margin of error. That [56] is, a deliberate few cents per ton or few cents per hour on each of the four Trusts.

Q Do you remember how much that was?

A No, I don't.

I guess I should add, while you are doing that, that would be in addition to the allowances we made for error in the projection. That was a surplus on top of the surplus.

Q That was off the top for future contingencies or unknown contingencies?

A Yes.

Q Mr. Pierce, I show you a document entitled, summary of Principal provisions, UMWA Health and Retirement Benefits, Joint Draft, November 25, 1974.

(Whereupon Summary of Principal Provisions, UMWA Health and Retirement Benefits Joint Draft, 11/25/74, was marked Plaintiffs' Exhibit No. 2, for identification.)

BY MR. MILLEMANN:

Q Do you recognize that?

A Looking at it hastily, it appears to be some attempts or one of the attempts that were made to describe benefits for the purpose of including it in the contract.

Q O.K.

A As a part of adjunct to Article 20.

MR. MILLEMANN: Your Honor, I should indicate this is a matter of record in the case in that this document was [57] provided in answer to Plaintiffs' discovery, which was conducted prior to the final summary judgment brief.

BY MR. MILLEMANN:

Q Mr. Pierce, I direct your attention in particular to Pages 6 and 7, specifically to Page 7, Paragraph 10, Sub-section (c).

Is that a description of the health services coverage, that paragraph generally?

A It appears to be an attempt at that. Whether it was correct or not, I don't know.

Q This is November 25. This would have been, as you say, after the conclusion of the actual negotiations and this would have been an attempt, as you say, to put down on paper what was agreed to?

A Yes.

Q Could you read or take a look at Subparagraph (c) and tell me what your understanding of the meaning of that was?

A It is an attempt to state that the widows or the surviving spouses of miners who retired and received pensions after May 29, 1946, would receive health care until death or remarriage.

Q That language means—correct me if I am wrong—a widow of a miner who retired and received a pension at any time on or after May 29, 1946, will receive upon approval of [58] application a health card.

Would this be your understanding to include a widow of a miner who within those dates received a retirement pension and went back to work and died at a time he was working in the industry?

A I am not an attorney.

Q I am asking your understanding.

A I would say a common sense reading of it, one might read it that way.

Q Is that the way it was intended, do you think?

A This was written by persons attempting to provide a summary of what the Plan documents said; and there is a disclaimer here at the front that the Plan language is controlling.

So while it may indicate that, I don't recall that that is the actual way the Plan language reads. There might be a conflict there.

MR. MILLEMANN: That is all.

THE COURT: Anything further?

MR. PARSONS: I have no further questions, Your Honor.

THE COURT: Thank you, Mr. Pierce. You are excused.

(Witness excused.)

MR. PARSONS: Defendants will call Mr. Roger Haynes to the stand.

Whereupon—

ROGER HAYNES

[59] was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you state your name and present address, please?

A Roger Haynes, 2425 John Oaks Drive, Pittsburgh, Pennsylvania.

Q Who is your present employer?

A Consolidation Coal Company.

Q What position do you hold with Consolidation Coal Company?

A I am vice-president for employee relations.

Q What are your duties and responsibilities in that position?

A I am responsible for compensation and benefits, development of training, management development, professional placement, communications, general personnel functions.

Q Did you hold your position of vice-president for employee relations in 1974?

A Yes, I did.

Q In 1974, did you participate in the negotiations of the National Bituminous Coal Wage Agreement during that year?

A Yes, I did. I was chairman of the BCOA Benefit Subcommittee on Benefits Negotiations.

[60] Q Had you prior to 1974 participated in the negotiations of previous National Coal Wage Agreements?

A Yes, I was in the same participation on the Subcommittee in 1971 negotiations.

Q Did you participate in the most recent negotiations of the Coal Wage Agreement?

A Yes, I did.

Q Were you once chairman of the Benefits Subcommittee for BCOA?

A Yes, I was.

Q In addition to your participation, focusing on 1974, in the Benefits Subcommittee, did you also participate in the main table bargaining sessions?

A Yes, I did.

Q In what capacity?

A Well, as chairman of the BCOA Benefits Subcommittee, when benefits were discussed at the main table, I was at the main table, as was someone from the union.

In addition to that, I became involved in the costing and the financial analysis of the program, assisting Guy Farmer at the main table.

Q When you spoke of your participation in the costing, was that of the over-all economic package?

A Yes, it was.

Q That included wages and other benefits in addition [61] to Health and Retirement Fund contributions?

A Yes, it did.

Q Mr. Haynes, could you briefly describe for us what is the Bituminous Coal Operators Association?

THE COURT: Oh, really.

MR. PARSONS: You don't need that.

THE COURT: I think I know enough about that to pass that over, if counsel don't mind.

MR. PARSONS: Thank you, Your Honor. We will move right along.

BY MR. PARSONS:

Q In focusing on the period prior to the commencement of the negotiations in 1974, did the Benefits Committee of the BCOA undertake any preparations prior to those negotiations?

A Yes. The Benefits Committee of the BCOA is a standing committee and has been since the latter part of 1969. We meet regularly, generally about once a month, sometimes more frequently, and have since that time.

So from the time the UMWA had their convention—I think it was sometime in the late fall of '73—we knew generally, as a result of publicity from that convention, the types of things that probably would be demanded.

We started preparing and developing costs and estimates and putting statistics together, setting our own objectives.

[62] Q In the course of this preparation, did the BCOA develop any objectives of its own in the bargaining with respect to health benefits?

A Yes, we did.

Q Could you briefly describe for us what those objectives were?

A We recognized that ERISA was one of the new requirements, that we were going to have to fund a pension plan.

Up to this point in time, there was no funding on the Pension Plan. It was pay-as-you-go. We knew that this was going to have to be funded.

We had come to the conclusion that it was important for us, in addition to negotiating the contribution rate or the royalty rate, that we negotiate the actual benefit levels and the eligibility for the benefits.

We had never negotiated up to this time a written document or the actual Plans, specifying who was eligible and who was not eligible and specifying what the level of benefits was.

This was one of our primary objectives. We knew that this was a horrendous task.

So we set as our primary objective to get the Pension Plan done during the '74 negotiations. Our objective was in every way we could possibly maintain a containment of the benefit level and the eligibility of people under the [63] already very liberal medical program.

Q Between the objectives you had with regard to the pensions and the objectives with regard to the medical program, which if any had a higher priority?

A Well, the priority for getting the pensions straightened out and getting the funding going on that, and trying to arrive at a system by which we could have a competitive industry-wide type of a pension program for our current workers was very important to us and an absolute necessity as far as the financing from the funding point of view was required. So this was our first priority.

Of course, we also always have to keep in mind that it is a necessity for us to be sure that whatever we negotiate in benefits, however we write the Plans, and so forth, is a tax deduction, contributions are tax deductible as a business expense.

There were a great deal of inconsistencies as far as benefit levels were concerned in the Funds, as far as medical pro-

grams were concerned; and we felt as though that would be a hopeless task to be able to get the Pension Plan and the Benefit Plans written in one negotiation.

So our primary objective with respect to the benefits, that is the health and medical, was to contain it and not expand it.

Q What was the authority of the BCOA Benefits [64] Subcommittee with respect to reaching agreements with the union on their demands in the bargaining?

A Our authority was one of coming to basic agreements that we could recommend to the main table. We didn't have any authority to finalize any agreement. But to make a joint recommendation or to identify the places where we differed as Subcommittees to the main table was our objective.

Q During the course of the negotiations in 1974, were there meetings between the BCOA Benefits Subcommittee and the main table negotiators to discuss the progress of the Health and Retirement Fund issues?

A Yes, there were.

Q What would be the substance of those meetings?

A The substance of our meetings between ourselves and the main table negotiators BCOA?

Q Yes, sir.

A It was to inform them as to where we were, what basic understandings we already had, in general, with respect to the structure with the union Subcommittee, to estimate the costs, provide them with what we thought were the estimated costs and contribution rates, converted on a tonnage basis at any given point in time as to just where we were.

We met with them regularly. We also had an objective to redesign the methods of financing the Plans.

Q What was the objective in terms of redesigning the [64] method of financing?

A The objective was to create a more equitable financial

structure between the underground operators and surface operators which have a big difference in level of productivity.

Q Did that—

A We wanted to go to the man-hour royalty rate, the man-hour contribution rate.

Q Which was a change from the traditional tonnage contribution?

A That is right.

Q Directing your attention specifically to the negotiations with the Subcommittee of the union on the question of health and retirement benefits, did the union, in its initial demand, demand health care coverage for groups of widows?

A Yes, they did.

Q What groups of widows were covered by the union's initial demands?

A I think initially the union's demand covered almost every widow that could be thought of.

THE COURT: That is what it looks like to me.

THE WITNESS: They have them categorized.

THE COURT: But it covered everybody.

THE WITNESS: It covered everybody.

BY MR. PARSONS:

Q Mr. Haynes, I am going to hand you a copy of what has [65] been marked for identification as Defendants' Exhibit No. 9.

(Whereupon Memorandum on Meeting Between UMWA and BCOA Benefits Subcommittees, dated, 10/3/74, was marked Defendants' Exhibit No. 9, for identification.)

BY MR. PARSONS:

Q This is a memorandum entitled, Meeting Between

UMWA and BCOA Benefits Subcommittees, dated October 3, 1974.

Can you identify that document, Mr. Haynes?

A Yes, I can.

This is a copy of a summary of the meeting that we had on October 3, prepared by Mr. Confry, who was a staff member of our committee, functioning as a statistician and on an actuarial basis.

Q Does that memo contain within it a summary of the union's demands with respect to health care coverage for widows?

Specifically I direct your attention to Page 3 of the exhibit, in the top half of the page, the third paragraph down.

A Yes. Well, one thing I was looking through here—whenever someone is eligible for a pension, a natural or full twenty-year pension, that automatically, because of their eligibility of drawing a pension, gives them a health card, covers them under the health card provisions. Provided it is a full twenty-year pension level or higher; and at that time that [66] was the case.

Yes, this covers in the third paragraph the demands for widow health card coverage.

Initially the demands were done verbally. So we tried to write up something to identify what we thought was said.

Q To your recollection, does this memorandum set forth the substance of the initial meeting between—of the meeting between the two committees?

A Yes, it does.

MR. PARSONS: Your Honor, at this time I would move the introduction of Defendants' Exhibit No. 9 into evidence.

THE COURT: It will be received.

(Whereupon Defendants' Exhibit No. 9 was received in evidence.)

BY MR. PARSONS:

Q Mr. Haynes—

THE COURT: Perhaps Mr. Haynes could just outline for the Court at this stage the course of the negotiations.

These were broad initial lay-down demands and I assume, without getting into it, that the operators indicated a substantial intransigence on everything.

That is the way negotiations start. What happened after that?

THE WITNESS: No, not really. That is not quite the [67] way it went.

We knew, because of the change in the administration of the union and the convention and all of the publicity—the publicity would have indicated to us that the benefit problems, the so-called benefit problems in total in the coal industry was going to be one of the number one priorities in the '74 negotiations. It was part of the election campaign of the union officers.

So we recognized that a significant part probably of the final package added up from the financial point of view would have to be devoted to benefits.

We also recognized that the total package would probably be substantial. We also recognized that first and foremost we had to fund the Pension Plans under ERISA before we had anything or maintain the status quo levels before we could consider increasing anything.

We had done a lot of preparation work in this area. So when the union made their initial demands and presented the Group A and the Group B places, and then a whole series of items that historically had been bad publicity type of items, we went back and talked to our Advisory Committee of the BCOA and developed a package as a counter-proposal which would hopefully—our objective was at that time to boil down the broad issues to two or three major economic issues as far as the level of benefits was concerned.

[68] Also one of our primary objectives was to get on with the writing of the Plans because we knew this was a big problem.

So we boiled this down fairly rapidly and in the negotiations agreed in principle to the Group A and the Group B and the 1950 Pension and Benefit Plans and 1974 Pension and Benefit Plans.

We knew that the level of pensions for the 1950 pensioners was going to be a major problem. But it wasn't going to delay the writing of our documents because we agreed to all the basic structural changes.

So the only thing we had to do as far as the Subcommittee was concerned in the final days—eventually there was an agreement—was to plug in what the numbers were.

We were vitally interested in the differential separating the 1950 pensioners and to giving recognition to the black lung benefit, what we call the black lung differential.

That we hadn't agreed on as far as the structure or that there would be any difference in the 1950 Pension Plan.

As far as the structure in the 1974 Pension Plan was concerned, we agreed fairly early on on the basic structure. The only question in the 1974 Pension Plan was the issue of what would be the level, dollar benefit per month per year of service. Also the joint survivor benefit question was still [69] later on an issue.

Mostly the Benefits Subcommittee came to basic agreement on these items fairly early on and then started working essentially on writing of the documents until the main table with all the other activities of what they were working on got down to the basic economics aspect of where it could all be tied together and see how much money was available, in order to feed it back in, whether it went to benefits or whether it went to some other aspect of the bargaining process.

THE COURT: Do you remember discussions about this class?

THE WITNESS: Yes, I do.

THE COURT: Involved in this lawsuit?

THE WITNESS: Yes, I do.

THE COURT: What do you remember about that?

THE WITNESS: Well, essentially, there were three major issues, major economic questions: One was the widows in general. All of the historical widows, what we call the 1950 people.

We didn't know a great deal about how many there were but we had already discovered that we weren't very good estimators from the standpoint of how many there were.

Some 26,000 pensioners had been added under Blankenship, which came as a real shock to us as to how many [70] people were out there in the woodwork, what we call the woodwork.

The way the Funds had operated, it wasn't necessary for them to keep records at all until such time as someone came in and applied for a pension. Since, roughly, through the early '50's, early '60's, we had 500,000 people. It had dropped down to 130,000 people.

We knew that there was a huge reservoir of unknown. Some widows, even today, from the standpoint of potential future 1950 pensioners, we don't know. Many actuaries are trying to estimate that and don't know, don't know how to come to it.

We know that there is bound to be a lot of widows. It was just in the crudest terms of trying to come up with how many might be there. But we knew it was large and, therefore, very expensive.

We knew the number of 1950 pensioners and we projected that with some unknowns on the woodwork people. But we knew that that dollar amount was a huge liability. Every ten-dollar increase in the 1950 pensioner level was a huge unfunded liability with in effect nobody working to contribute in their behalf, all used up as it went.

So we had some real financial problems in this area. The unknowns of these widows. We had not agreed to any coverage for widows or any expansion for coverage of widows [71] historically.

We did agree for future widows under the 1974 Pension Plan, 1974 Benefits Plan. But the entire widow question was one of the areas we hadn't agreed to at all.

The black lung differential is one of the areas we had not agreed to. We had not agreed to come to an agreement on the level of the pensioner death benefit. These were items our Subcommittee never did agree to. These were items that went to the main table and ultimately became part of the main table decisions, what they agreed to at the main table.

THE COURT: Were you at the main table when the decision was made not to include this particular class of widows?

THE WITNESS: Yes, I was.

THE COURT: What do you recall about the discussion on that?

THE WITNESS: Well, we had reached that point in our negotiations where it became quite clear to those people who were involved that one of the union's bottom lines, one of the things that was uncompromisable as far as they were concerned was doubling of the contribution rate or reaching the $1.60, which they had publicly done a great deal of advertising on.

We had already agreed to the S&A benefits, which [72] was the equivalent of about five cents a ton. So the figure became $1.55. We weren't at $1.55 from a cost point contribution according to our estimate. We were at about $1.46.7 or .47, or somewhere in that range and we were on strike.

Mr. Yablonski made a very emotional and moving speech during the sessions that $1.55 was going to be it, period. So our people evaluated that and came back and made a counterproposal which would bring us—we were anxious at this time to get the benefits thing wrapped up and not a part of the re-

maining issues—we made a counter-proposal to come back and cover specifically the widows of 1950 pensioners.

We wanted to resolve the issue of death benefits at $2500, not $3,000. We wanted full agreement on our method of financing, the man-hour hourly rate and the tonnage rate. We wanted recognition for the black lung differential.

I think we offered the benefits for the widows of the 1950 pensioners and we offered to increase, I believe, it from $195 a month to $200 a month.

We made that offer after being in caucus overnight or something of that nature. The union took it, caucused, came back the next meeting and accepted it.

In accepting it, we finalized our negotiations on that aspect.

THE COURT: You finalized it in that way rather than a specific discussion of this particular issue. A [73] limited offer was accepted.

THE WITNESS: That is right. They had it divided into three types or three issues of widows. We specifically came back and made an offer on the widows of the 1950 pensioners and they accepted that counter-offer that we made.

Once we had the $1.55 accepted at the main table, then the only work remaining was for our Subcommittee to finalize the documents.

THE COURT: Drafting

THE WITNESS: Drafting

THE COURT: Right.

MR. PARSONS: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. MILLEMANN:

Q Mr. Haynes, I believe you made reference to the fact that when discussing the Plaintiff class, as to what size you thought they were—could you please just briefly tell me your

understanding of who is included in the Plaintiff class in this case?

A My understanding is, it is those widows of miners who were working prior to the '74 negotiations, who would have been eligible for a pension on the date of their death.

Q Would that include—

[74] A Eligible to receive a pension.

Q Thank you.

A A vested right.

Q To the best of your recollection, looking back on your and the Subcommittee's use of the term, "working but eligible," which I assume is the group we are talking of, would that group, in your opinion, sir, have included the widow of a miner who reached age fifty-five, had the years of service, became sick, stopped working and died without ever returning to work and without ever applying for a pension?

Would the working but eligible classification include that widow?

A Yes.

Q It would?

A You essentially would only have two classifications: Either the person receiving a pension or the person not receiving a pension.

Q I believe you said, and correct me if I am wrong, you had some concerns about the size of this working but eligible group but you knew it was large, is that correct?

A That is right.

Q How did you know it was large?

A We had already been through the Blankenship area where we had 68 or 69 thousand pensioners and there were a [75] general group of people who felt as though the Blankenship numbers wouldn't be large. Who they were, I don't know. We didn't know. But it turned out to be 26,000 people.

Q O.K.

A And we learned that there is an awful lot of people out there in the woodwork that nobody knows about.

Q Besides this bad experience in finding out in another case with another class that there were more than you thought, did you have any other reason to believe it was a large group?

A Yes. We had 500,000 people working in the mines in the early '50's, late '40's and early '50's. At that time the vast majority of the mines were UMWA-represented mines. That is a large number in relationship to the numbers of active people and the number of people covered in our benefit program. We had at that time close to 80,000 pensioners.

Q So in a sense, there were a whole lot of people working out there in the '50's, is that what you are saying?

A We knew something had happened to them.

THE COURT: Had been working.

BY MR. MILLEMANN:

Q Anything else besides the concern about the Blankenship experience and the fact that there were 500,000 people in the coal fields in the '50's?

A We estimated that in this pensioner widow class—[76] I heard Don talk about 40,000—we estimated a minimum of 25,000 and perhaps a maximum of 50,000.

Q So you gave yourself a 25,000 margin of error on that one?

A We sure did.

Q O.K. Now, was one of your priorities going into the negotiations to reward employees who kept working with signatory employers after age fifty-five?

A Yes. The new '74 Pension Plan is designed as an incentive. The longer you work the higher your pension.

Q In fact, isn't part of the reason of the quantifiability problem as to the Plaintiff class here the fact that these widows' husbands did in fact work after age fifty-five, many of them with signatory employers and did contribute massive amounts of—

MR. PARSONS: I object to that. The class is not limited to who were working in signatory employment at the time of their death.

MR. MILLEMANN: I didn't mean to imply it was.

THE COURT: I know it isn't.

MR. MILLEMANN: May I go ahead?

THE COURT: You can ask the question.

BY MR. MILLEMANN:

Q My question, Mr. Haynes, is did you consider the fact, in light of your priority to reward signatory service [77] after age fifty-five, that at least some of the deceased husbands of the Plaintiff class of widows in fact did keep working after fifty-five and in fact did keep working with signatory employers and that is why they hadn't retired and applied when they died?

Was that a consideration that entered your minds at the time?

A No, our consideration was reacting and responding to the demands of the union.

Q O.K.

THE COURT: You were pricing an expanding group of demands.

THE WITNESS: That is right. We were trying to respond and meet, to the degree they fitted into the over-all economic package of the negotiations, the demands of the union.

BY MR. MILLEMANN:

Q Thank you.

Is it your recollection, also, sir, that a reserve amount was left, we negotiated into the 1950 Benefit Trust to cover unknown contingencies?

A There were a lot of unknowns and we tried to build in sufficient cushions where it wouldn't go broke. It turned out that we weren't good enough at that and, of course, we did go broke.

[78] We were estimating rise in inflationary medical costs at about twelve and a half per cent. At that point in time, in 1974, we were very alarmed that we might not be estimating it anywhere near high enough.

Q One last question. Am I correct that 1974 marked the first time that the collective bargainers took it upon themselves to actually bargain eligibility levels in the United Mine Workers contract?

Prior to that time, had that discretion been allocated to the Trustees?

A Prior to that time—it was in 1971 when we started discussing with the union the classes and eligibility of people but there weren't any actual changes in 1971. In '74 was the first time we had actually written it down.

Q Did BCOA support this notion of taking it upon the collective bargainers to actually bargain eligibility categories rather than leaving it to the Trustees?

A This was one of our high objectives.

Q Could you briefly explain to me why that was one of your objectives?

A Well feel that the benefits is a part of the overall compensation package; that it has been well established that it is one of the areas of collective bargaining. That the two parties should through collective bargaining process arrive at who is eligible and who is not eligible, what the [79] levels of benefits are and all other aspects of the working relationships.

MR. MILLEMANN: Thank you.

I have no further questions, Your Honor.

MR. PARSONS: I have no further questions.

THE COURT: We will take a ten-minute recess. You have a witness, I understand.

MR. MILLEMANN: Yes. He will be quite brief, Your Honor.

THE COURT: All right. Thank you, Mr. Haynes.

(Witness excused.)

(Whereupon a short recess was taken.)

MR. MILLEMANN: We call Thomas Bethell. Whereupon—

THOMAS N. BETHELL

was called as a witness by the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLEMANN:

Q Please state your full name.

A Thomas N. Bethell.

THE COURT: How do you spell that?

THE WITNESS: B-e-t-h-e-l-l.

BY MR. MILLEMANN:

Q Mr. Bethell, what is your present occupation?

[80] A I am the Director of Brophy Associates, an independent research and consulting firm in Washington.

Q As of 1974, were you employed by the United Mine Workers of America?

A Yes, as a Research Director.

Q As director of the union's Research Department?

A Correct.

Q What was the period of your employment with the union?

A I went to work for the union in early 1973 and left in early 1977.

Q Prior to your work with the union,—what is your educational background?

A My educational background is that I did undergraduate work at Harvard University. Prior to the union I worked primarily as a journalist and educator and a researcher on energy and coal-related issues primarily working in eastern Kentucky.

Q What involvement if any did you have in the preparations leading up to and the 1974 Bituminous Coal Wage Agreement negotiations?

A My involvement was similar to that described in detail by Mr. Pierce.

I was the staff coordinator for negotiations with respect to all economic benefits that were dealt with primarily [81] in the Research Department. I was the staff coordinator or director —actually, we didn't really have titles—for the Health and Retirement Subcommittee and I participated in the main table negotiations with respect to economic benefits.

Q As such, did you sit in on all of the Health and Retirement Fund Subcommittee meetings?

A Not all but most of them.

Q Did you sit in on any of the main table sessions?

A Yes, I did.

Q Could you briefly relate your understanding of the definition of class in this case?

A As I understand this class, it is the widows of UMWA working miners who died while still in a working status and would have been eligible for pensions but for the fact that as working miners they had not applied for pensions.

Q Thank you.

MR. MILLEMANN: May I see Defendants' No. 5.

BY MR. MILLEMANN:

Q I show you Defendants' Exhibit No. 5, and ask if you recognize it?

A Yes, I do.

Q Could you describe what this exhibit is?

A This is one of a series of brief memoranda that I prepared for the main table negotiators on the status of [82] unresolved issues in our Subcommittee.

I am sorry, not the status of unresolved issues but the status of issues, both resolved and unresolved in our Subcommittee.

Q Thank you.

I direct your attention to Paragraph 6, Subcategory (a), citing the category of miner who was working at the time of his death but was eligible for a pension.

As to your recollection at the time in using those terms in the Subcommittee, is that, working but eligible, synonymous with the class in this case?

A As I understand it, it is synonymous with but broader than the class in this case.

Q In what way would it be broader than?

A It would have included miners who—

Let me back up a step. It would envision only two classes of miners, working miners or retired miners. A working miner would be not necessarily one who was still literally working on the day of his death but who had not left that category.

He might, for example, have become disabled with black lung but have been under the belief that he was going to go back to work in the mines; and at some point he dies without having gone back to the mines.

He is still possibly a working miner, depending [83] on what his status would be on the company's pay roll, and so forth.

Q Thank you.

Now based on your experience and your recollection at the time as a member of the Subcommittee and research director, what effect on the size of this working but eligible group would there be if it were in fact limited to miners who worked right up to the time of their death and did not die in mining accidents?

A It would reduce the size of the group.

Q Would you have any opinion as to how much it would reduce the size of that group?

A I think Mr. Pierce and Mr. Haynes have both described the difficulties that both sides had in quantifying the size of this group.

It was a serious problem throughout negotiations. Mr. Pierce's recollection of a group encompassing 4,000 people is essentially the same as my recollection would be. But I think we were in agreement with Mr. Haynes' Subcommittee members that it was in fact a very difficult number to arrive at.

Q Thank you.

Now this estimate of 4,000 people, then, would be the estimate for the larger group, the over-all working but eligible group, correct?

[84] A Yes, that is correct.

Q Now, in terms of your role as a Subcommittee member, and the attempts to quantify this working but eligible group, what if anything would you have done differently or what data if any would you have requested that you didn't request if you had been talking only about the widows of men who worked right up to the time of their death and did not die in a mining accident?

MR. PARSONS: Excuse me. I object to that. That is very speculative.

THE COURT: Yes. That is sustained. We are not interested in that at all. We are interested in what they were talking about.

BY MR. MILLEMANN:

Q In addition to the figure as to the number, did the union make estimates in the bargaining of the estimated cost of including the working but eligible group?

A We did.

Q Are any of those estimates indicated anywhere on this Defendants' No. 5?

A They are indicated in the margin to the left of Paragraph No. 6 and they are broken down in my handwriting.

THE COURT: Is that 25 cents for A?

THE WITNESS: No, that is 2.5 cents.

THE COURT: 2.5 cents for A?

[85] THE WITNESS: And 2.5 cents for B and 7.0 cents for C.

Those numbers, to the best of my recollection, are numbers arrived at in our Subcommittee primarily through the work that Don Pierce did with actuaries that we were talking about.

THE COURT: How much money are we talking about when we say 2.5?

THE WITNESS: We are talking about 2.5 cents per ton. Throughout the discussions—

THE COURT: How many tons were people talking about?

THE WITNESS: The estimates appear in some of the documents as you have them. My recollection is you are talking about close to 400,000,000 tons per year.

You are talking about a total royalty package of about $1.55 a ton, equivalent, so-called.

The reason we used the term, equivalent, although we were already talking about a royalty based on both tons and man hours, for convenience we did a conversion which allowed a shorthand discussion in tons alone, since that is what people were familiar with.

THE COURT: So that is about a billion cents.

THE WITNESS: It sounds right to me.

THE COURT: Which in terms of dollars, we are talking about what?

[86] MR. PARSONS: About a hundred million dollars, Your Honor. Ten million, I am sorry.

THE COURT: A hundred million dollars?

MR. PARSONS: No, I am sorry. I have been corrected by Mr. Haynes to ten million dollars.

THE COURT: Ten million, yes.

THE WITNESS: Whose counting.

BY MR. MILLEMANN:

Q I show you a document marked Plaintiff's Exhibit 4, a memo dated October 20, 1974, to a number of people from you, regarding health and retirement proposals and counter-proposals.

(Whereupon Memorandum dated 10/20/74, Health and Retirement Fund Proposals and Counter-proposals, was marked Plaintiffs' Exhibit No. 4, for identification.)

BY MR. MILLEMANN:

Q Do you recognize that document?

A Yes, I do.

Q Can you describe for the Court what this document represents?

A In its entirety?

Q Generally and I will direct you to specifics.

A As the title implies, it is a general review of the issues being dealt with by the Subcommittee at that time.

[87] Q O.K. I direct your attention to Page 4 of the document, Subparagraph 3, dealing with:

"Widows of working or pensioned miners who died prior to effective date of contract."

THE COURT: Is this 4?

MR. PARSONS: I am sorry, I am very confused, Your Honor. Is this Defendants' 4 or Plaintiffs' 4?

THE COURT: Whose 4 is this?

MR. MILLEMANN: Plaintiff's, Your Honor. I don't believe this has been admitted or introduced by Defendants.

THE COURT: I was working on Defendants' 4. Plaintiffs' 4?

MR. MILLEMANN: Yes, sir.

MR. PARSONS: What is the date of that again?

MR. MILLEMANN: Memo, October 20, 1974 from Tom Bethell to Arnold Miller and others.

THE COURT: All right.

BY MR. MILLEMANN:

Q This Subparagraph 3, what indication is there, if any, of the union's estimate to quantify the cost of including the widows of working or pensioned miners?

A In Subparagraph 3 there is a breakdown by categories or by sub-categories that adds up to a total estimated cost of fourteen cents per ton for all widows' programs encompassed.

[88] Q And what was the estimate, if any, for the widows of working or pensioned miners?

A In Subparagraph 3, the breakdown is for widows receiving a $1,000 one-time death benefit and restoration of the health card; and the breakouts are that the one-time payment would cost ten cents and that the restoration of the health cards would cost 1.5 cents.

Q The restoration being for life or until death?

A That is my recollection.

THE COURT: When we are talking widows, this class, of course, includes all the dependents of widows, all the children that haven't reached majority.

Were they in the discussions?

THE WITNESS: I believe they were but I am not positive. I think that the general drift of the discussion was throughout the negotiations primarily concerned with the individual.

THE COURT: The widows, themselves.

THE WITNESS: The widows, themselves.

THE COURT: So it would be a bigger figure than those estimates, if you are throwing in health benefits to minor children.

THE WITNESS: It would be a bigger figure but I am not positive on my memory whether or not those dependents were being included.

[89] I assume in recall that they were, yes.

BY MR. MILLEMANN:

Q To the best of your recollection, did the Bituminous Coal Operators Association ever refute the union's estimate of the cost or size of this group of working but eligible?

A Mr. Haynes in his testimony today has basically covered the same ground that he covered repeatedly during those negotiations about a so-called woodwork population in which there were undeterminable numbers of people lurking, and how many of them would emerge, he maintained, no one could estimate with any certainty.

So to that extent, yes, he refuted our ability to try to pin down numbers.

Q Now, Mr. Bethell, between November 11 and November 13, as we are now well aware, something happened to leave out certain widows and include certain others.

Can you describe to the best of your recollection the process leading up to that decision and what you know about the reasons for it?

A Negotiations were extensive, continuous during that period of time. The 1971 agreement was coming to an end. The strike was beginning. Communications between the Subcommittee and the main table negotiators were frequent.

We reviewed more than once daily the status of [90] issues still in Subcommittee.

During that three-day period of time, it is my recollection on the Subcommittee we were led to the conclusion that negotiations in our area with respect to the size of the tonnage royalty that could be negotiated were effectively at an end at around $1.55 a ton.

It has been described properly by other people here this morning that this is part of an over-all economic package. You are not negotiating just one. So there is that constant flux as you try to determine where you are in other areas that have a cost attached to them.

We were hopeful, and I think until the very very end, that we could do better than that, because it was our best estimate —and it only was an estimate—that the industry was prepared to go further than that.

But, in general, as negotiations came to an end on the 13th, that is probably the best I can do in describing a general climate.

Q Very well.

Were you at the main table when the union decided to accept the $1.55 figure?

A I would rather answer that by saying that I was at the main table when the union accepted the industry's last offer. I don't believe that the $1.55 figure was discussed per se in the last discussion.

[91] Q You were at the main table when the last offer was accepted?

A Yes.

Q Did that effectively freeze the state of negotiations in terms of including any additional groups of beneficiaries in the Subcommittee?

A Yes.

THE COURT: Sure.

BY MR. MILLEMANN:

Q Was negotiation as to coverage still going on in the Subcommittee at the time that the main table acceptance was made?

A Yes.

Q Did you have notice that the main table bargainers had decided to accept the last offer?

A No, not really. Not in the sense that we had had that kind of communication previously. It was a very abrupt decision.

THE COURT: Pressures had been mounting both ways all week, hadn't they?

THE WITNESS: Yes, they had. The only way I would amplify on that, Your Honor, is that normally the flow of communications was that prior to any decision being made at the main table there was a series of discussions between ourselves and the main table. In this case there was not.

[92] THE COURT: This had reached a point where the main table had taken over.

THE WITNESS: That is true.

THE COURT: As I recall as a newspaper reader, there was a good deal of pressure on the main table to come to some decision.

THE WITNESS: There was.

BY MR. MILLEMANN:

Q How would you describe the atmosphere at that time as between the Subcommittee and the main table in terms of communications back and forth?

A Chaotic, necessarily probably.

Q Mr. Pierce, I show you—

A Mr. Pierce is—

Q Mr. Bethell, I am sorry.—a document that has been marked as Plaintiffs Exhibit 5, which is entitled the National Bituminous Coal Wage Agreement of 1974.

(Whereupon National Bituminous Coal Wage Agreement of 1974 was marked Plaintiffs' Exhibit No. 5, for identification.)

BY MR. MILLEMANN:

Q I direct your attention in particular to Page 31, Section H, Subparagraph 5, and ask you—

MR. PARSONS: I am going to object to that question. I don't see what a discussion of that portion—

[93] THE COURT: He hasn't asked a question yet. So I think you had better reserve your objection until he has.

MR. PARSONS: Thank you, Your Honor.

THE COURT: It would help me rule on it.

MR. PARSONS: Very well.

THE COURT: What is the question?

MR. MILLEMANN: Well, first I would like Mr. Bethell to take a moment to read the language in Subparagraph H(5).

THE WITNESS: O.K.

BY MR. MILLEMANN:

Q Now, who wrote that language, do you know?

A I had a hand in drafting Subparagraph 5. The over-all language—you are talking about—

Q Just the Subparagraph 5.

A Just Subparagraph 5. I don't think I can adequately tell you everybody who had a hand in that. I had a hand in it.

Q Did you participate in the writing of that?

A Yes.

Q The language of that Subparagraph 5, which reads:

> "The Trustees are authorized, upon approval by the employers and the union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary [94] or appropriate."

And going on with more detail.

Do you have any recollection, based on your participation in the writing of that or based upon your role as a Subcommittee member as to what was intended by that language?

MR. PARSONS: Objection. I believe that is not relevant to the issue presently before the Court.

The Court has already made a ruling in its memorandum of what the Court perceives to be the proper interpretation of that section as applied here.

THE COURT: I think that is right.

What do you propose to show?

MR. MILLEMANN: What I propose to show is consistent with the evidence, in fact, even in the best of collective bargaining sessions, there are arbitrary exclusions made, that in fact the Settlors had in mind the fact that this would occur and had in mind that the Trustees must have the power in all situations to do something about those.

THE COURT: You suggest to me they had in mind that the Trustees would up the ante by including a broader coverage than agreed to at the bargaining table?

MR. MILLEMANN: Well—

THE COURT: A substantially broader coverage of a whole different class of people?

[95] MR. MILLEMANN: I am certainly not suggesting that this language—

THE COURT: The whole testimony is to the contrary.

MR. MILLEMANN: I am not suggesting this language was applied or intended to apply only to Plaintiff class. I am only suggesting that the Settlors in fact envisioned that there would be problems in the way of arbitrary exclusions even with the best of bargaining and in fact recognized that the Trustees at that point have some independent duty to try and resolve those.

That is why I am asking Mr. Bethell the question.

THE COURT: I will let him make his answer but I doubt if I will accept it. I will let him make his answer.

BY MR. MILLEMANN:

Q Do you remember the question, Mr. Bethell?

I am asking whether you have any recollection, based on your participation in the writing of this or your work as a Subcommittee member as to why that language was put in.

A I think that language addresses a hoped-for resolution of a conflict between BCOA's priorities and the UMWA's priorities with respect to the role of the Trustees.

THE COURT: And changing conditions of law.

THE WITNESS: And the changing conditions of law, yes.

I think, if I may characterize that period of time, [96] both sides were acutely aware of proceeding in an unknown area. This was the first major agreement, I believe, to be negotiated following enactment of ERISA.

THE COURT: Right.

THE WITNESS: It was a source of enormous confusion to both sides. It still is.

THE COURT: And the Court. Don't keep me out of it.

THE WITNESS: I am sorry, I didn't mean to be exclusionary.

I think that the language of Subparagraph 5 addresses in a fairly subtle way both the necessity for the Trustees to have some maneuvering room in order to conform to law and the expectation that the Trustees should not be so constrained in terms of their responsibilities as to have their hands tied when unforeseen developments took place that might permit slight changes in direction for the Funds.

THE COURT: Right.

THE WITNESS: This goes back really to Blankenship and to the feeling on both sides, while the Trustees needed to be constrained, there is not much point in having Trustees at all unless they have the latitude to be constructive when the opportunity arises.

MR. MILLEMANN: Plaintiffs would move their Exhibits 2 through 5 into evidence.

THE COURT: They will each be received.

[97] (Whereupon Plaintiffs' Exhibits Nos. 2, 3, 4 and 5 were received in evidence.)

MR. MILLEMANN: That is all the questions at this time, Your Honor.

THE COURT: Do you have any questions?

MR. PARSONS: I don't have any questions, Your Honor, but I do have a housekeeping matter.

(Witness excused.)

MR. PARSONS: It appears that Defendants' Exhibit No. 8 was not admitted into evidence. At this time I would like to move its admission just to make sure we have it in.

THE COURT: All right. It will be received.

(Whereupon UMWA Proposal, 11/13/74, Health and

Retirement Benefits, was marked Defendants' Exhibit No. 8 and received in evidence.)

MR. PARSONS: Thank you, Your Honor.

MR. MILLEMANN: While we are at that, I would like to bring the Court's attention to a matter. Following the conference in chambers after the summary judgment oral argument, the Court indicated that the discovery materials had never been attached to the summary judgment papers.

Plaintiffs made a motion to have that done and I am advised there had been no order entered. I wanted to bring that to the attention of the Court in the event that is necessary.

[98] This was discovery done by Plaintiffs after Defendants' motion for summary judgment and prior to Plaintiffs' motion.

THE COURT: I am not aware of what you are talking about.

MR. MILLEMANN: Let me just back up briefly then.

Plaintiffs asked for leave and were granted leave to conduct some discovery on some of these issues or attempt to.

THE COURT: Oh, yes, I recall that.

MR. MILLEMANN: In the conference in chambers after the oral argument, the Court indicated that while this discovery had been filed, it had not ever been made a part of the summary judgment proceedings; and whereas it may be in the Clerk's office and records, the Court hadn't considered that.

THE COURT: I remember that.

MR. MILLEMANN: Following that, Plaintiffs filed a motion to in fact have those discovery materials—

THE COURT: Included in this proceeding.

MR. MILLEMANN: Yes, sir.

THE COURT: It can't be included in it. Is it identified in your motion? I don't recall ever seeing the motion.

I have just forgotten the motion.

[99] MR. MILLEMANN: What the motion does is identify particular portions of the Defendants' answers which appeared to be relevant in light of inquiries made by the Court in oral argument.

MR. PARSONS: I think that would be somewhat redundant at this point. The portions of the documents that we had at that time are included in the more complete exhibits offered at this stage. I don't see the necessity of it.

MR. MILLEMANN: If that is true as to the documents, I have no reason to have them admitted. There were also answers to interrogatories which we had asked.

MR. PARSONS: I have no objection to answers to interrogatories.

THE COURT: I will remind myself to act on that motion as an unopposed motion.

MR. MILLEMANN: Thank you, Your Honor.

MR. PARSONS: The Defendants have no further witnesses, Your Honor.

THE COURT: I will have to consider this testimony.

I don't see any point of any briefing or discussion because after all I have written now twice in this matter.

This has clarified the record fully and I appreciate the cooperation of counsel.

I will come out with a little memorandum.

MR. MILLEMANN: Your Honor, I would ask for leave [100] to tender a copy of a recent decision from the Northern District of Ohio, which is in the BNA Pension Reporter, a copy of which I have given to Mr. Parsons. It is a very recent decision. I think it may shed some light on ERISA.

THE COURT: All right, glad to have it.

Is there anything else?

MR. MILLEMANN: Nothing further from the Plaintiffs, Your Honor.

MR. PARSONS: Nothing further from the Defendants.

THE COURT: Thank you both.

(Whereupon at 12:05 p.m., the hearing was concluded.)

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on June 14, 1978 and that the foregoing Pages 1 to 100, inclusive, constitute the official transcript.

/s/ Ida Z. Watson
IDA Z. WATSON

V.

ORDER OF THE SUPREME COURT GRANTING PETITION FOR CERTIORARI

Filed October 5, 1981

SUPREME COURT OF THE UNITED STATES

No. 81-61

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Petitioners,

v.

GRACIE ROBINSON and JUANITA HAGER, *etc.*

ORDER ALLOWING CERTIORARI. Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

VI.

STATUTES INVOLVED

STATUTES INVOLVED

Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 186(c)(5), provides:

* * * *

(c) The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for

an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . . .

Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3), provides:

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by an other person who is not an employer as herein defined.

Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3), provides:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—. . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . . .

Section 404(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1), provides:

> (a)(1) Subject to sections 403 (c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.